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A Treatise  
on  
TRUST COMPANY  
LAW

*by*

JOHN H. SEARS

of the New York Bar. Author of "Trust Estates as Business  
Companies," "Corporations in Missouri."

CHICAGO:  
T. H. FLOOD & COMPANY

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John H. Sears

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## PREFACE

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The purposes of this book are stated in the Introductory Chapter. Whether the labor expended upon it has been justified can only be ascertained by its practical uses, now untried.

To Judge Needham C. Collier of St. Louis the author subscribes his grateful acknowledgment for assistance in its preparation.

JOHN H. SEARS.

37 Wall Street,  
New York City, May, 1917.



# Table of Contents

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## CHAPTER I.

### Introductory.

- § 1. Scope of this Work.
- § 2. Desirability of Uniform Laws.
- § 3. Outline of Trust Company Functions and Plan of Treatment in this book.

## CHAPTER II.

### Definition of "Trust" Companies—Protection of Name.

- § 4. Fiduciary Companies Defined.
- § 5. "Trustee Company" in England.
- § 6. Statutory Trust Company in America.
- § 7. Enlarged Sense Given to the Word "Trust."
- § 8. Protection of the Title "Trust Company."
- § 9. Protection of Particular Trust Company Names.

## CHAPTER III.

### Special and Exclusive Privileges of Trust Companies.

- § 10. Constitutional Provisions in their General Aspect and Police Power.
- § 11. Discriminations as between Corporations and Individuals.
- § 12. Right of State to deny certain powers to other than Corporate Fiduciaries.

## CHAPTER IV.

### Qualification of Trust Company to Assume Fiduciary Functions.

- § 13. Preliminary.
- § 14. Necessity that Trust Company Should Receive Compensation.

- § 15. Oath by Statutory Fiduciary Unnecessary.
- § 16. Qualification by Deposit of Securities.
- § 17. Consolidation, Merger and Successorship of Trust Companies—Status with reference to Fiduciary Business of constituent Companies.

#### CHAPTER V.

##### Diversity and Limitations of Powers. Ultra Vires.

- § 18. Powers of Trust Companies in General.
- § 19. Ultra Vires as Affected by Fiduciary Power in a Corporation.

#### CHAPTER VI.

##### Extension of Functions of Statutory Trust Companies, Banks, Agents, Guardians and Committees, Receivers and Assignees, Sureties, Guarantors, Underwriters.

- § 20. Corporation Limited to Charter Powers.
- § 21. Principles of Construction of Trust Company Charters.
- § 22. Organization under General and Special Laws.
- § 23. The Trust Company as Having Varied Powers.
- § 24. Trust Companies as Banks.
- § 25. Trust Companies as Agents.
- § 26. Trust Companies as Guardians and Committees.
- § 27. Trust Companies as Receivers and Assignees.
- § 28. Trust Companies as Sureties.
- § 29. Power of Trust Companies to Act as Guarantors.
- § 30. Trust Companies as Underwriters.

#### CHAPTER VII.

##### Trust Companies as Trustees.

- § 31. Trust Companies Generally Like Individual Trustees.
- § 32. Specific Provisions as to Integrity of Trust Funds.
- § 33. Integrity of Trust Funds—Participating Mortgages.
- § 34. Deposit of Trust Funds in Company's Own Banking Department or with Company's own deposits in other Banks—Interest Rates.
- § 35. Provisions in Trust Company Statutes respecting Investments.
- § 36. Liability of a Trust Company for Trust Funds.



- § 37. The Following of Trust Property and its Proceeds.
- § 38. Right to follow Trust Funds turned over by a Statutory Trust Company.

### CHAPTER VIII.

#### Trust Companies as Co-Fiduciaries and as Agents for Individual Fiduciaries.

- § 39. In General.
- § 40. Liability of Joint Trustees.
- § 41. Liability of Joint Executors and Administrators.
- § 42. Liability as Agent for Individual Fiduciaries.

### CHAPTER IX.

#### Trust Companies as Trustees for Charities.

- § 43. In General.
- § 44. Origin and Plan of the "Foundation" or "Community Trust."
- § 45. The Legality of "Community Trusts."

### CHAPTER X.

#### Stipulations for Protection of Trust Company—Indemnity Clauses.

- § 46. In General.
- § 47. Examples and Construction of Indemnity Clauses—Co-Trustees.
- § 48. Examples and Construction of Indemnity Clauses—Employment of Agents.

### CHAPTER XI.

#### Trustees for Bond Issues.

- § 49. Preliminary.
- § 50. Form of Instrument to Secure Bond Issues.
- § 51. Legality of Such Instruments.
- § 52. Active Nature of Trusteeship for Bond Issues.
- § 53. Theory and History of Mortgage-Deeds for Bond Issues.
- § 54. Express and Implied Covenants in Mortgage-Deeds of Trust.
- § 55. Details in Form of Mortgage Deeds of Trust.
- § 56. Nature and Extent of Implied Duties.

- § 57. Liability of Trustee for Damages for Breach of Trust  
—Parties.
- § 58. Liability for Misrepresentations as to Quality and  
Extent of the Security.
- § 59. Instructions of Mortgagor and Bondholders as Pro-  
tection to Trustee.—Majority Rule.
- § 60. Application by Trustee for Advice and Instruction of  
the Court.
- § 61. Singleness of Duty Owed by Trustee in Bond Issues.
- § 62. Trustees under Conflicting Mortgages. Intervention  
by Individual Bondholders.
- § 63. Trustees under Conflicting Mortgages.—Continued.
- § 64. Removal of Trustee.

## CHAPTER XII.

### Car or Equipment Trusts.

- § 65. Derivation and Need of Equipment Trusts.
- § 66. Protecting Legislation.
- § 67. Status of Equipment under After-Acquired Property  
Clauses.
- § 68. Safety of Investments in Car Trusts.
- § 69. Criticism of the Form and Security of Car Trusts.—  
Clauses for Reports to Trustees.
- § 70. Suggestion that Liens for Equipment be given Prior-  
ity by Legislative Enactment.

## CHAPTER XIII.

### Transfer Agents and Registrars.

- § 71. In General.
- § 72. Implied Power of Bank to Act as Transfer Agent.
- § 73. Implied Power in Banks to Create Transfer Agencies  
Not Sufficient for Business Necessities. Express  
Power of Trust Companies.
- § 74. Possibility of Compelling Corporations to Authentici-  
cate their Securities through Independent Sources.
- § 75. Transfer Agent Defined.
- § 76. The terms "Registrar" and "Registered" Defined.
- § 77. Definition and Effect of "Countersigning."

- § 78. Right of Corporation to place Restrictions upon Transfer and Issue of its Stock Incident to Services of a Countersigning Agent.
- § 79. Liability of Companies for Acts of their Transfer Agents, Registrars, etc.
- § 80. Liability of Trust Companies as Transfer Agents.
- § 81. Liability as Transfer Agent—Continued.
- § 82. Liability as Transfer Agent—Concluded.
- § 83. Liability as Registrar of Stock.
- § 84. Importance of Terms Used by Trust Company in Describing its Capacity—Contracts in Limitation of Liability.
- § 85. Precautionary Requirements and Rules as Protection against Improper Transfers.
- § 86. Liability as Affected by Sub-Agency of Employees.
- § 87. Printing of Fiduciary's Name on Instruments Does Not Constitute Signature until Blank for Signature of Officer is Filled.
- § 88. Inspection of Books of Transfer Agent—Mandamus and Penalties.
- § 89. Where Cause of Action Arises with reference to Transfers by Transfer Agents.

#### CHAPTER XIV.

#### **Trust Companies as Depositaries—Safe Deposit Companies.**

- § 90. Preliminary.
- § 91. A Trust Company as Depositary.
- § 92. Liability of Officer for Loss of Funds in Depositary.
- § 93. Liability of Officer Depositing Private Funds.
- § 94. Depositaries as Gratuitous Bailees.
- § 95. Property Held as Collateral by a Bank.
- § 96. Liability of Safe Deposit Companies.
- § 97. Possession of Safe Deposit Company so far as Attachment is concerned.
- § 98. Joint Renting and Access.
- § 99. Access under Power of Attorney.

**CHAPTER XV.****Escrows.**

- § 100. Preliminary.
- § 101. The Nature of a Strict Escrow Agreement.
- § 102. Summary.

**CHAPTER XVI.****Trust Companies as Conveyancers, Abstractors and Title Insurers.**

- § 103. In General.
- § 104. Searching, Abstract Business and Title Insurance Defined and Contrasted.
- § 105. Relation assumed by Trust Company in Examining Titles and Acting as Conveyancer.
- § 106. Duty as Conveyancer to Advise Client of Encroachments.
- § 107. Liability and Measure of Damages for Negligence and upon Title Policies.
- § 108. When the Company as Abstractor is Liable to Employer and when Liable to Third Persons for whose Benefit Abstract is obtained.
- § 109. Title Insurance Covers Interest Insured irrespective of the Real Interest of the Policy Holder. Insurance Company placed on Notice to use Great Care.
- § 110. Record Title Only Insured.
- § 111. Policy of Title Insurance construed to be one of Indemnity though Guarantee added.
- § 112. Provision for Subrogation of Company.—Effect on Right to Recover on Policy.
- § 113. Avoidance of Policy by False Answer in Application.
- § 114. Construction of Policy.—Exceptions and Conditions.
- § 115. Rights against Grantor not affected by fact that Grantee has Title Insured.
- § 116. When Statutes of Limitation begin to run on Title Policy.
- § 117. Company's Right of Access to Public Records.—Remedy of Mandamus.
- § 118. Right of Access to Public Records. "Patent or Short Form Indices" Not Required by Law to be Kept.

- § 119. Right of Access to Public Records. Indices of United States Courts Required by Law to be Kept.
- § 120. Regulation by Register where Title Company is making complete copies of Records—Number of Employees Having Access to Records at One Time Limited.
- § 121. Private Abstract Books and Records as privileged against Disclosure under Subpoena Duces Tecum.
- § 122. Liability to Title Company for Fees.—Participation of Attorney.

### CHAPTER XVII.

#### Corporations Practicing Law.

- § 123. Preliminary.
- § 124. A Corporation not a Person so far as Licensed Professions are concerned.
- § 125. Statutes regarding Practice of Law by Corporations.
- § 126. Agreements by Attorneys with Unqualified Persons a Common Law Offense.
- § 127. Attorney Appearing for Corporation Practicing Law cannot take Advantage of its Illegal Conduct.
- § 128. Distinction as to Corporation furnishing Services to Attorneys at Law.

### CHAPTER XVIII.

#### External or Foreign Business.

- § 129. In General.
- § 130. Prima-facie Presumption that Trust Company has the Power to execute a trust in a Foreign State.
- § 131. Branch Offices.
- § 132. Exclusion of Foreign Trust Companies—Need of Special Laws for Admission in Some States.
- § 133. Mere Acceptance of Mortgage Trusteeship without Action under Trust Deed not doing business in Foreign State; Taking possession of property and operating it might require qualification.
- § 134. Right to sue without qualifying in Foreign State.—Individual and Fiduciary Capacity.
- § 135. Complying with Local Laws. Deposit of Securities.

- § 136. Foreign Trust Company Qualifying as Executor by giving Bond and appointing Agent for Service of Process with respect to a Particular Estate.
- § 137. Effect of Non-compliance by Trustee upon Validity of the Trust.
- § 138. Jurisdiction over Fund held by Domestic Trust Company under a Will proved in a Foreign State.
- § 139. Restrictive Statutes not Retroactive.
- § 140. Service of Process upon Director of Foreign Trust Company.
- § 141. Continuance of Authority of Agent for Service of Process after Withdrawal from State.

### CHAPTER XIX.

#### Trust Company Officers.

- § 142. Impersonation of Trust Company by its Officers.
- § 143. Duties of Directors. Liability for Neglect. Distinction as to Executive Committee.
- § 144. Authority of Officers.
- § 145. Imputable Knowledge of Officer.
- § 146. Distinction in Rule of Notice and Guarantee of Fidelity.
- § 147. Knowledge to be Imputable to Trust Company must presume Fraud.
- § 148. Notice to Officer in his Department.
- § 149. Protection of Customers' Affairs from Disclosure by Trust Company Officers and Agents.
- § 150. Competency of Trust Company Officers, Employees and Stockholders to act as Notaries and Witnesses.

### CHAPTER XX.

#### Visitation and Supervision—Reports—Insolvency— Preferences.

- § 151. Visitation—Supervision—Reports.
- § 152. Identifying of Trust Fund or its Proceeds necessary in Equity.
- § 153. Same Applied to a Trust Company.
- § 154. Acts of Officers creating Trust Fund though no money passes to Trust Company.

§ 155. Statutory Preferences Against insolvent Trust Company.

APPENDIX.

	Pages
Trust Company Statutes and Sources from which copies may be obtained .....	262
“The Model Trust Company Law”.....	269
New York:	
Text of Trust Company Law.....	279
Instructions and Forms for Organizing a Trust Company under the Laws of New York.....	328
Precedents Showing Amendments to Charter of a New York Trust Company.....	338
Trust Company Charters .....	353
Trust Company By-Laws .....	382
Community Trusts:	
The Cleveland Foundation.....	427
Los Angeles Community Foundation.....	434
Boston Permanent Charity Fund.....	447
Mortgage-Trustee Clauses Annotated .....	460
Report of the Committee on Railroad Bonds and Equipment Trusts to the Board of Governors and Members of the Investment Bankers Association of America, 1914 .....	474
Suggestions to Corporations Desiring the Services of a Trust Company as Transfer Agent to Register Transfers of Stock .....	496
Suggestions about Stock Transfers.....	497
Report of Conference of Transfer Agents and Counsel....	500
Instructions to Transfer Department as to Transfer Requirements .....	519
Laws, Rulings and Opinions Relating to the Admission of Foreign Trust Companies to do business in various States .....	527





## CHAPTER 1

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### INTRODUCTORY

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§ 1. **Scope of This Work.** That phase of business life which has grown out of its equitable principles in regard to trusts, has received greatly the attention of American law makers. Legislation along these lines proceeds not only upon the theory of defining the contract relationship of parties, but also upon that of public policy in the restraining of artificial beings created by law to prescribed functions in and about such relationship. It also enacts particular procedure as to violated right for and against such beings, all of which will be considered hereinafter from the standpoint of general principles, assisted as far as may be by such adjudicated cases as I have discovered.

While distinction as to application of principle so far as individuals and corporations are concerned constantly will be stressed, necessarily the discussion often will involve primary rights as between man and man and such evolution of Equity jurisprudence as modern conditions require.

I know of no book, yet appearing, of this nature, though there have been several very excellent books giving the history of legislation in regard to these corpora-

tions and pointing to the great growth in America of corporate effort in a field where confidence was formerly reposed only in individuals. These individuals were chosen because of fitness and integrity in and about the performance of the trust duties imposed. Duties of this nature, therefore, formerly would not take kindly to the thrusting forward of oneself, but would wait upon selection by the creator of a trust. When corporations enter on the scene, the aspect of things become wholly changed. They proffer showing of their equipment for successful performance and financial responsibility behind their offers to perform.

It has been debated *pro* and *con* whether corporations were preferable or not to individuals in such relations, but all I am here concerned in is knowledge of the fact that the law recognizes corporate trustees, and whosoever chooses to avail himself of their offer of services is at liberty to do so. The rule of stringency in measuring their liability may be deemed to be invoked by them, because of the way they hold themselves out.

Of course, the equipment of which I speak may call for more than is found in other kinds of corporations. The confidential nature of his duties may prevent to some extent the procuring of the relation of trustee on a purely business basis. There is advice and solicitude in particular cases to be regarded and sentiment to be considered. These call for officials of different characteristics than the calculating corporation ordinarily presents. If the latter has no red blood in its veins, its agents, through whom only it acts, should appreciate pulsations of sympathy and truly interpret the intentions of trustors. The law is not as dry as dust in all of these matters.

It is conceivable, therefore, that a corporate trustees' board may sometimes be vested with discretion, which calls for the possession of other attributes than business acumen or experience. Hard and fast rules should not apply to the management of every trust. For example, a minor's guardian might with advantage be something more than a mere legal abstraction and so, on occasion, it might be in other instances.

Finally, it may be stated that all of the fiduciary relations which corporations assume as expressly authorized by statute, or which the law otherwise permits them to assume, I will endeavor to expose and declare according to the principles of law and equity, to see how far this legislation corresponds or departs therefrom; that is to say, how it is declaratory of these principles or introduces other law opposed thereto.

In this work I hope to be of assistance in the interpretation of this legislation and in defining what it may embrace of things not specifically provided for. My inquiry invokes the maxim, "the old law, the mischief and the remedy." The old law on these subjects is that of intrinsic right and its application in a branch of equity. The mischief may consist, as claimed, in the uncertainty about the life and continuing responsibility of individual trustees, their adaptability and training for the duties imposed. The remedy is the removing of this uncertainty. That often there may exist this uncertainty as to individual fiduciaries, no one may gainsay. Besides all of this, to make provision for corporate trustees compels no one to resort to them. It but amplifies the rights of owners in the selection of their agents and particularly defines, or tends to define, the duties and obligations of the latter.

§ 2. **Desirability of Uniform Laws.** Considering that all of the legislation above referred to is to vest in corporations the right to hold themselves out to the public in and about matters coming under the police powers of the State, and that the interrelations of citizens of different states are more intimate than under former conditions, it becomes apparent that there ought to be uniformity therein throughout the states. Such legislation, essentially, is of the adjective rather than of the substantive law of a commonwealth. It comes under the same quality of public policy in one state as in another. There are no intrinsic rights involved, yet it affects in great measure the general commercial rights of citizens of all states.

Furthermore, as the adjective quality of this legislation concerns general principles of universal application, rather than statutory remedies, it ought to be as broad in application as are those principles. When adjective law varies in its provisions, this is but diversity in detail, and yet it might make a great difference in results, and provoke contrariety in ruling of substantial importance.

Still further, as there is practically the same need in different communities for these corporate agencies, why should there not be uniformity as to their organization, powers, restrictions and safety? The rule of construction, that what is expressed excludes what is unexpressed, especially is important as regards the detail of such statutes, and it is wholly unnecessary to subject statutes to the danger of variant construction by different courts.

This legislation being designed to meet a general rather than a local demand, it should not be gored by the reefs on the shores of different states, but should sail

like a noble ship on the broad bosom of the deep sea of the principles of right and justice, whose application it seeks to assist.

What is good and worthy of permanence in trust company laws has been developing from the experience of various states. It is advocated that this experience be eventually crystallized into one code, and that to this end new legislation in each state should strive to conform its trust company laws as nearly as possible to a standard in matters of organization, powers, restrictions and safety. By this means trust companies everywhere will increasingly attract that confident reliance, which easily understood and known laws create.

**§ 3. Outline of Trust Company Functions and Plan of Treatment in This Book.** The practical division of a typical trust company's activities, in its widest scope, is as follows:

- (1) Banking:
  - (a) Commercial.
  - (b) Savings.
- (2) Fiduciary services to both individuals and corporations:
  - (a) Trustee under agreement or declaration of trust.
  - (b) Agent or Attorney in fact.
  - (c) Depositary of Escrows.
  - (d) Depositary of other papers and property.
  - (e) Renting of safe deposit vaults and boxes.
  - (f) Examination and Insurance of Titles to real estate.
  - (g) Receiver and Assignee.
  - (h) Surety.

- (3) Fiduciary services to individuals:
  - (a) Trustee under will.
  - (b) Executor or Administrator.
  - (c) Guardian, Committee or Conservator.
- (4) Fiduciary services to corporations:
  - (a) Trustee for bondholders.
  - (b) Trustee for Voting Trusts.
  - (c) Agent for re-organizations.
  - (d) Fiscal agent.
  - (e) Transfer agent.
  - (f) Registrar.
  - (g) Guarantor and underwriter of securities.

However useful the above division may be from a business point of view, it cannot be strictly followed in a legal treatise. The legal questions affecting trust companies, which it is the purpose of this book to discuss, are those which differentiate their legal status from that of individuals conducting like businesses. There are many cases in which trust companies figure, in their various capacities, in such a way as not to vary the ordinary rules of law. Discussion of these cases properly belongs in books devoted to banking, trustees, wills, insurance, receivers, contracts, corporations, etc., and is therefore excluded from this work. A process of elimination by which the subject could be reduced to the legal topics that may properly be called "trust company law" and as such are exclusive of problems not affected by this form of organization, has required an arrangement which merely approaches the practical division of activities above outlined.



## CHAPTER II

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### Definition of "Trust Company"—Protection of Names

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§ 4. **Fiduciary Companies Defined.** A corporation is, in essence, but an agency to do or carry on something for the benefit of its stockholders. In this way there is created between them and the managing officers of the corporation, a relation approaching that of a trust. Technically, however, it amounts to little more than an obligation by an employe to perform service in and about his employment. The services he can perform, whether of a manual nature, or in the exercise of judgment and discretion, belong, potentially, to those shareholders and stand the same as property in his hands, for which he should fairly account.

This situation is in no wise different in essence from that of principal and agent, which, technically, is not a trust relation, because thereby, though manual possession may change, legal possession does not.

When we get away from the ordinary corporation, as a principal for its shareholders and bring in others who resort to it, we reach the fiduciary rela-

tion it is my purpose to consider in this work, but there are considerations intervening, still, which may militate against this. Take for example a banking corporation that sets up to accept money of depositors and pay it out on checks. The courts hold that here arises the relation of debtor and creditor. Take again, a common carrier, a warehouseman, a storage company, and there is bailment with liabilities of bailee differing according to fixed principles in the law of contract. What then are the kinds of corporations which represent the relation of which it is intended to speak? Generally it may be said they are those which take the places of individual trustees as known to courts of equity. In addition they include the performance of other duties, the obligations in law, attaching to which are as well defined as some of the things above spoken of. For example, the duties of executors, administrators, guardians, curators and the like.

**§ 5. "Trustee Company" in England.** In England a fiduciary company is called a "Trustee Company" and it has been defined to be "A company incorporated by statute and authorized by special act to undertake the duties of executors, administrators and trustees for pecuniary reward."<sup>1</sup>

In this case distinction is discussed between the powers of ordinary trustees and trustee companies, in investing the funds of a trust, and the court concluded that the section, claimed to refer to investments, in fact referred only to deposits. The trustee company, therefore, was held to the same rule of

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1. *Perpetual Executors, etc., Ass'n v. Swan* (1898), A. C. 763, 764, 67 L. J. P. C. 141, 79 L. T. R. N. S. 148, 14 L. T. R. 587.



liability in investment of funds as an ordinary trustee; that is to say, to "investments in real or Government securities." It is to be noted that "Trustee Company" is, as such companies are, specifically named under what is called the "Trustee Act, 1890" of England.

§ 6. **Statutory Trust Company in America.** But in this country the phrase "trust company" seems not so confined. It has been said that "The enumeration of the forms of transaction, which may be regarded as germane to the purposes of the modern trust company, is by no means a simple task. If we consider the problem from the standpoint of the variety of transactions in which, as a matter of common knowledge, that class of corporations currently engage, 'Trust company' might almost be regarded as nomen generalissimum for financial and promoting companies."<sup>2</sup> The question in this case being one of tax on gross receipts, it was held the sources of the receipts would not be particularly considered, but these sources were in "all kinds of business which fairly fell within the powers usually found in their (trust company) charters or currently conducted by them."

The question of the meaning of the phrase "trust company" was more directly involved where it was claimed that the title "an act concerning trust companies," did not under constitutional limitation include nor express any object of legislation respecting safe deposit and trust companies.<sup>3</sup> The court recites the history

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2. *State v. Central Trust Co.* (1907), 106 Md. 268, 67 Atl. 267.

3. *State v. Twining* (1906), 73 N. J. L. 683, 64 Atl. 1073.

of trust companies as known to legislative usage, saying that: "It is matter of common knowledge, that after these companies had been clothed with extensive trust powers, they were commonly known and designated as trust companies, and the Legislature in applying to them the name 'trust companies' adopted the popular designation. \* \* \* It results that the title of the act of 1899 expressed the object of the act to be legislation concerning trust companies, including not only such corporations as were trust companies *eo nomine*, but all corporations which had the functions of trust companies and were recognized in legislation as such."

By this we get the conclusion that a trust company is not exclusively such, but there are other things not particularly of a trust nature, it may be empowered to perform, which does not rob it of its general appellation of trust company.

In New York it would appear that in common parlance and by general understanding, a trust company was not a corporation solely devoted to the accepting and executing of trusts, but it was empowered to do these things and had other corporate powers as well. Thus it was said: "A trust company, when so used in this chapter, is defined by section 2 to mean any domestic corporation formed for the purpose of taking, accepting and executing such trusts as may be lawfully committed to it and acting as trustee in the cases prescribed by law *and*<sup>4</sup> receiving deposits of money and other personal property and issuing its obligations therefor, and of loaning money on real or personal property."<sup>5</sup> It would seem that the policy of New York

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4. Italics supplied.

5. *Venner v. Farmers' Loan & Trust Co.* (1900), 54 N. Y. App. Div. 271, 273, 66 N. Y. Supp. 773.

is not to confine such companies to a purely trust business, but the presence of such power assisted its characterization as a trust company. The English term, "Trustee Company," rather seems to indicate a more definite confinement of its activities, though if a corporation under such a name were clothed with other powers, as a general rule, latitude in description would be indulged, as admirably said in *State v. Central Trust Co. supra*.

In a New York Court of Appeals case, it is pointed out that statutory "trust companies exercise the powers conferred upon individual banks and bankers," but "it is very obvious that trust companies are not, in the legal and commercial sense, engaged in the business of banking."<sup>6</sup> Among other things in the enumerated powers granted to trust companies under New York statute not of strictly trust nature, is that it "acts as agent for corporations in reference to the issuing, registering and transferring certificates of stock and bonds and other evidences of debt," to say nothing of the provision that it "acts as guardian for the estates of infants," a relation defined by specific statutory provisions.

The Federal Supreme Court in considering the New York statute regarding trust companies, differentiates them from banks as follows: "It is evident from this enumeration of powers, that trust companies are not banks in the commercial sense of that word, and do not perform the functions of banks in carrying on the exchanges of commerce. They receive money on deposit, it is true, and invest it in loans, and so deal, therefore, in money and securities for money in such a way as properly to bring the shares of stock held by individuals therein within the definition of moneyed

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6. *Jenkins v. Neff* (1900), 163 N. Y. 320, 330, 57 N. E. 408.

capital in the hands of individuals as used in the Act of Congress. But we fail to find in the record any sufficient ground to believe that the rate of taxation, which in fact falls upon this form of investment of moneyed capital, is less than that impressed upon shares of stock in national banks.”<sup>7</sup>

This language surely does not apply to any function or title held, by a trust company purely as a trustee, but it does recognize that a trust company, as granted other powers, sustains a relation to depositors similar to that of banks, viz: debtor and creditor, and that it is in business as a trust company to make money in the investment of such deposits and of other funds belonging to its capital.

#### § 7. Enlarged Sense Given to the Word “Trust.”

A Pennsylvania case is interesting as showing how broadly the words “execute trusts” may be construed and also as showing that an opposing trust company in the case was brought in as a mere bailee, supposedly under statutory powers conferred on it.<sup>8</sup> It was objected that a trust company under a general grant of power to “execute trusts of every description” had no corporate capacity to act as committee of a lunatic, but the court ruled that in the absence of specific restriction in its charter, it must be presumed that it had such power. The words “trusts” therefore, is seen not to be confined to those of purely equitable nature, but they embrace a merely statutory relation as well. The defendant trust company came into the suit as having in its possession as a depository, a box kept for such purpose containing certain muniments of title, negotiable

7. *Mercantile Bank v. New York* (1887), 121 U. S. 138, 30 L. Ed. 895.

8. *Equitable Trust Co. v. Garis et al.* (1899), 190 Pa. 544, 42 Atl. 1022.

securities and personal property belonging to a lunatic for the possession of which his committee was suing. Probably both of these trust companies possessed similar chartered powers, embracing the doing of other things than to "execute trusts of every description."

The reasoning of the Pennsylvania court as to the broad meaning to be given to the words, "execute all trusts," is followed in a Missouri case,<sup>9</sup> where a foreign trust company sued in that state as committee for the estate of an habitual drunkard, an individual being the committee of his person. Missouri statute provided no method for appointment of a guardian for a non-resident.

The New York statute was somewhat more specific than that of Pennsylvania, it authorizing the trust company to execute all such trusts as may be committed or transferred to them by order of the supreme court, or by a surrogate or by any of the courts of record. Nevertheless if trusts of purely equitable cognizance had been meant, and not those defined by statute, there is nothing in the statute itself specifically to the contrary. The trust company was recognized under the rule of comity.

#### § 8. Protection of the Title "Trust Company."

To prevent irresponsible corporations from trading upon the standing implied from the term "trust company," it has been found necessary to enact legislation to prevent the use of the word "trust" in the titles of corporations other than those formed under the special laws of states providing for trust companies. This legislation in its highest form, limits the names available to corporations of various classes and also makes it

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9. *Glaser v. Priest* (1888), 29 Mo. App. 1.



criminal to use the word "trust" except as authorized by law. Under a statute of this class, it has been held that a pre-existing corporation may not change its name so as to use the word "trust" without violating the law,<sup>10</sup> but such a corporation will not be compelled to eliminate the word "trust" from its title.<sup>11</sup>

**§ 9. Protection of Particular Trust Company Names.** Fiduciary companies are protected in the use of their adopted titles the same as other corporations. A review of cases involving this question will illustrate the practical manner in which this is carried out. "The International Loan and Trust Company of Kansas City was prohibited from using this name in Massachusetts where there was a domestic trust company named the "International Trust Company." It was, however, permitted to operate under the titles "International Loan and Trust Company of Kansas City," or "The International Loan and Trust Company of Kansas City, Missouri."<sup>12</sup> The decision was placed upon the following ground:

"We think it is clear that the defendant's corporate name is so nearly identical with the plaintiff's that it would be misleading, and that the ruling to that effect was correct. But we think the object of the statute was to protect corporations organized here, and engaged in any business named in it, from the injury which they might receive through the use in this state of the same or nearly identical name of a foreign corporation engaged here in the same business, and also to protect our own citizens who may be supposed to be familiar with, and to have more or less confidence in our own corpora-

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10. *State v. Nichols* (1905), 40 Wash. 437, 82 Pac. 741.

11. *Pacific Title & Trust Co. v. Sargent* (1915), Ore., 144 Pac. 452.

12. *International Trust Co. v. International Loan and Trust Co.* (1891), 153 Mass. 271, 26 N. E. 693, 10 L. R. A. 758.

tions from being misled, in such a case, by the identity or similarity of the names. If, therefore, a foreign corporation carries on its business under a name in fact the same as, or nearly identical with, that of a domestic corporation, it should be enjoined, however different its corporate name might be. The public is misled, and the domestic corporation suffers, and the foreign corporation ought not be allowed to escape liability on the ground that, while the name that it actually uses, is the same or similar, its corporate name is not. On the other hand, even if the corporate name of a foreign corporation was the same, or nearly identical, with that of a domestic corporation, yet if it did not carry on its business under such name, but under a different and dissimilar one, there would seem to be no reason why it should be enjoined. No harm would be done, and nobody would suffer.”

A case where the name of a trust company commonly in use, as distinguished from its full legal title, was protected against infringement by a corporation of another state, is found in the Federal Reporter.<sup>13</sup> Therein it appears that “The Philadelphia Trust, Safe Deposit and Insurance Company” had become generally known as the “Philadelphia Trust Company.” It was incorporated under the laws of Pennsylvania, and engaged in a general trust business in Pennsylvania, New Jersey, Delaware, and other states. The Defendant organized under the general corporation laws of Delaware, using the name “Philadelphia Trust Company.” In restraining the use of this title by the Delaware Company, it was observed, among other things that :

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13. Philadelphia Trust Safe Deposit & Ins. Co. v. Philadelphia Trust Co. 1903), 123 Fed 534. That the courts favor that corporation that first lawfully uses the name, see Central Trust Co. v. Central Trust Co. of Ill. (1906), 149 Fed. 789.

“While a corporation generally, if not invariably, is confined to the use of its corporate name in judicial proceedings and its transaction of business, it may by usage, be generally called, to the public, by a different name. \* \* \* The conclusion is almost irresistible that the selection of the name of the defendant was unjust and inequitable, in that it was intended that the defendant should unfairly take advantage of the credit, good name, reputation and business standing of the complainant, as an old and successful corporation, to the prejudice of the complainant and in fraud of the public.”

The title “Farmer’s Loan and Trust Company” was protected in behalf of the old established New York company against interference by a Kansas corporation of the same name, in so far as the foreign corporation operated in New York, by requiring it to add the word “of Kansas” to its name, in its New York operations.<sup>14</sup> The court remarked that:

“The name ‘Loan and Trust Company’ is not an uncommon one, as applied to certain monetary institutions; and it would seem that the prefix ‘Farmer’s’ has been applied to designate companies engaged in similar business in different states; there being, according to the affidavits, no less than seven ‘Farmer’s Loan and Trust Companies’ in the United States.”

The two companies were not engaged in the same activities. The New York corporation does a regular trust company business, whereas the defendant confined its operations to selling securities, but there was evidence that it was profiting by the complainant’s standing in disposing of them from its New York office, and the public was being deceived.

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14. *Farmers’ Loan and Trust Co. v. Farmers’ Loan and Trust Co. of Kansas* (1886), 1 N. Y. Supp. 44, 21 Abb. N. C. 104.



Where there was no statutory provision protecting a previously adopted corporate name, and protection was sought on equitable grounds alone, in analogy to trademark protection, it was held that the name "The Nebraska Loan and Trust Company" would not exclude the subsequent use of the name "Nebraska Loan and Trust Company" in another city of the state. The fact that the word "Nebraska" is a geographical name, appears to have largely influenced this decision.<sup>15</sup>

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15. *Nebraska Loan and Trust Co. v. Nine* (1889), 27 Neb. 507, 43 N. W. 348, 20 Am. St. Rep. 686.

## CHAPTER III

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### Special and Exclusive Privileges of Trust Companies

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§ 10. **Constitutional Provisions in Their General Aspect and Police Power.** The principle of equality of right of every citizen in and under the law finds its expression, *ex industria*, in our federal and state constitutions. This expression, in its various manifestations, is like that of statutes declaratory of the common law. In essence it confers nothing and is a limitation on nothing, not previously existing, according to the pole star of construction in our theory of right. Rather is it to be regarded as a guaranty against encroachment by legislatures claiming to act within omnipotence where not specifically limited.

Whether legislatures in this country without restraining influence of constitutions, would possess the omnipotence, that is ascribed to the English parliament, need not here be discussed. It is certain, however, that our habit is to look only to our constitutions for definite check upon their powers, and, generally, we manage to get along without having to say what are legislative powers outside of specific constitutional limitations. It is certain they are not omnipotent so far as bargaining away police power for the future is concerned.<sup>1</sup>

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1. *Stone v. Missouri* (1879), 101 U. S. 814, 25 L. Ed. 1079.

To me, however, it seems that the problem may affect or give color to the quality or kind of construction of constitutional restraints. We see, at least, that insofar as there are grants of power by our federal constitution, these operate against the unlimited right of contract and may take away vested rights acquired thereby.<sup>2</sup> This would imply that the people of a representative form of government are, through their legislative assemblies, omnipotent, save as they are restrained by a superior document more directly emanating from them and called a constitution. Viewed from this standpoint, restrictions in a constitution should be construed with narrowness, whether they be strictly in such form or read like grants, but the pole star above referred to comes into play so as to justify all enactments seemingly against equal rights under what is popularly known as a state's police power, a something defying definition fully satisfactory either in inclusiveness or exclusiveness. It has been said that: "To embalm it (police power) in any fixed or rigid formula would be to destroy its value, for it would then be deprived of its indispensable quality of adaption to changing conditions, and thus defeat the ends it was intended to promote."<sup>3</sup> When it is attempted to describe its extent, the best we are able to do is to speak in general terms.<sup>4</sup> And it is paramount to any rights under contracts between individuals.<sup>5</sup> There seems no barrier to its effect except in the "fundamental rights secured by

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2. *L. & N. Ry. Co. v. Mottley* (1911), 219 U. S. 467, 55 L. Ed. 297.

3. *McGuier v. Chicago, B. & Q. R. Co.* (1906), 131 Iowa 340, 108 N. W. 902, 33 L. R. A. (N. S.) 706.

4. *Chicago, B. & Q. R. Co. v. Illinois* (1906), 200 U. S. 561, 50 L. Ed. 596, 4 Ann. Cas. 1175; *Jacobson v. Massachusetts* (1905), 197 U. S. 11, 49 L. Ed. 643, 3 Ann. Cas. 765.

5. *Manigault v. Springs* (1905), 199 U. S. 473, 50 L. Ed. 274.

the federal constitution,"<sup>6</sup> federal police power not being here spoken of. I imagine that the federal police power, which our supreme court has called to the aid of the constitutionality of the "White Slave Act" also is subject<sup>7</sup> to the specific grants of power found in that constitution.

**§ 11. Discriminations as Between Corporations and Individuals.** In a Pennsylvania case,<sup>8</sup> where, as the opinion says: "The single question in this case is the constitutionality of the act of June 24, 1895," in regard to authorizing trustees and others to charge an estate with the reasonable fee paid a company for becoming his surety, the court said: "The objection wholly fails to observe the fundamental distinction between corporations and natural persons. The act of incorporation 'itself is a discrimination as to privileges, powers and liabilities against the natural person.'"

Then after enumerating the various purposes for which corporations may be chartered, the court appeals to its judicial knowledge as to the difference between an individual and a corporate surety so as to justify the charge upon an estate, notwithstanding that no charge could be made where an individual surety is obtained.

It was said: "The individual surety, as formerly known, was usually a relative or a friend who had confidence in the principal and voluntarily assumed the obligation of answering for the latter's faithful performance of duty. I need not speak of the individual who became surety for pay, for the very name of 'professional bail-goer' is a reproach to every branch of the

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6. *Kansas City Gas Co. v. Kansas City* (1912), 198 Fed. 500, 511.

7. *Hoke v. U. S.* (1913), 227 U. S. 308, 323, 57 L. Ed. 2, 43 L. R. A. (N. S.) 906.

8. *Re Clark* (1900), 195 Pa. St. 520, 46 Atl. 127, 48 L. R. A. 587.

administration of justice, which he was allowed to contaminate with his presence. But the voluntary surety, however honest and well qualified at the time of his approval by the court, is liable to the contingencies of business, the changes of value in property, and the inexorable chance of death, which brings his estate into the administration of the law under wholly changed circumstances. Of the happening of any of these contingencies, the only person in position to keep close watch is the principal, and his interest is averse to making known any doubt as to the sufficiency of his friend, or to assume the burden of finding a new surety. \* \* \* On the other hand, the surety company \* \* \* must have a capital, the amount, nature of investment and management of which are known and within constant sight of the court and parties interested. \* \* \* It is on this difference that the discrimination in the act of 1895 is founded and it is a fair and constitutional basis for the legislative discretion."

The court deemed this ruling well within the principle previously declared in that court, that the legislature lawfully might confine the insurance business to corporations,<sup>8</sup> though to my mind it is an extension of the former ruling in that it directly authorizes the levying of a charge on private property of a third person which the former decision does not do. Both of them, however, come under the police power of the State. This police power was thought to be exemplified, "in view of the magnitude and the nature of the insurance business," making it "apparent that the public is interested in all that relates to it." It was further said that: "Pri-

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8. *Com. v. Vrooman* (1894), 164 Pa. 306, 30 Atl. 217, 44 Am. St. Rep. 603, 25 L. R. A. 250.

vate individuals are not subject to the same visitorial powers" as corporations. "They cannot ordinarily be compelled to disclose their business methods, their financial condition or the character of their investments. They cannot be restricted in the use of either their capital or their profits as corporations may be. Those who deal with them must trust more to their personal integrity than common experience shows to be safe. The state can compel a fair measure of fidelity in the management of these vast sums, and provide for the safety of the insured when, and only when, the business is in the hands of corporations." That the Pennsylvania court is correct insofar as it declares the business of insurance *juris publici* and subject to governmental regulation, has since been declared by our Federal Supreme Court,<sup>10</sup> to which there was dissent by three of the eight members sitting, the dissent going mainly on the proposition that regulation did not extend to fixing rates. There was no question here of the right of an individual to carry on such a business if statute attempted to confine it to corporations.

At all events, these two Pennsylvania cases tend to show that corporations may be given the exclusive right to carry on business affected by a public interest, and that as the business is so affected, they may authorize corporations to charge the estates of minors, decedents and *cestuis que* trust in relation thereto, though private persons may be allowed to execute the same trusts.

The United States Supreme Court has held that a

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10. *German Alliance Ins. Co. v. Lewis* (1914), 233 U. S. 389, 58 L. Ed. 1011.



state might provide "that no banking business should be done except by corporations."<sup>10½</sup>

In Kentucky discrimination between corporations and individuals has been adjudged valid in a statute requiring individuals as assignees in conveyances for the benefit of creditors to take an oath and give bond and merely requiring that the capital of a corporation "shall be taken and considered as the only security" necessary.<sup>11</sup> The same question was again considered in the case of a statutory trust company appointed a guardian of a minor,<sup>12</sup> and the court said:

"If it be constitutional for the Legislature to confer upon this corporation the power to act as statutory guardian, and we think it is constitutional, it follows that the legislature has the power to prescribe the terms upon which it may act as such guardian."

In Wisconsin, in answer to the claim of unjust discrimination in favor of a corporation and as against private individuals to act as assignees without bond, the court said: "The fact that it gives no bond except in the discretion of the court, but gives security by depositing securities with the state treasury, cannot be considered as unjust discrimination. Such reasoning would invalidate many just and statutory laws. The question is one of legislative policy."<sup>13</sup>

In a Minnesota case<sup>14</sup> the point was directly made that the general law, under which the trust company party was incorporated, gave special and exclusive

10½. *Assarie State Bank v. Dolley* (1911), 219 U. S. 121, 55 L. ed. 123; see also *Weed v. Bergh* (1910), 141 Wis. 569, 124 N. W. 664, 25 L. R. A. (N. S.) 1217; *contra Marymount v. Nevada State Banking Board* (1910), 33 Nev. 333, 111 Pac. 295.

11. *Bank of Commerce v. Payne* (1887), 86 Ky. 446, 8 S. W. 856.

12. *Johnson v. Johnson* (1889), 88 Ky. 275, 11 S. W. 5.

13. *Roane Iron Co. v. Wisconsin Trust Co.* (1898), 97 Wis. 273, 74 N. W. 818.

14. *Minnesota Loan and Trust Co. v. Beebe* (1889), 40 Minn. 7, 41 N. W. 232, 2 L. R. A. 418.

privileges was noted but apparently was little noticed. The court, indeed, seems not to have understood the nature of the objection. It is recited that in many of the states, particularly the older ones, the trust company "is fast becoming the favorite method of administering estates and executing trusts."

It is to be noticed, generally, that the objection upon which this grant of exclusive right as against an individual to act in a fiduciary capacity has turned not upon the competency of legislatures to endow a corporation with such right, but rather upon the frame of legislation under which the power has been conferred. This has excused them wholly, or in the discretion of the court, from the giving of bond with sureties for the faithful performance of the trust reposed in them. And the courts generally have overruled the objection upon the grounds that the visitorial power of the state and requiring deposit of securities virtually take the place of sureties given by individuals in like instances. In addition it is said there is more of stability in this than in personal sureties, all of which constitutes a basis for rational discrimination under constitutional restrictions.

At all events legislation along this line appears too fully recognized in this country for courts to stop to listen to objections of this nature, coming as it does under police power, and especially as it concerns rights in the devolution of estates, which at best are but privileges under statutes of descents and distribution. It is to be noted that these objections apply only to appointment of executors, administrators, guardians, committees and assignees, all of which are of statutory origin and creation and to such offices there is no personal privilege other than as defined by the



statute itself. So far as the creation of trusts by acts of settlors, this is but the upholding of the right of contract and the old idea of a corporation not being competent or qualified to act as trustee seems thoroughly exploded. As to this it was said by Sharkey P. J. that: "Before the statute of uses, there was a limitation of restriction as to those who could stand seized to uses; but since the passage of that statute,<sup>15</sup> trusts have been adopted to supply the place of uses and the former inability to stand seized to a use no longer prevails. The general rule now is that all persons capable of confidence, and of holding real or personal property may hold as trustees. Corporations may now hold as trustees, although they could not be seized to a use before the statute."<sup>16</sup>

**§ 12. Right of State to Deny Certain Powers to Other Than Corporate Fiduciaries.** I have no specific authority to prove that the state might require, under its police power, that no individual should be accepted as a statutory fiduciary. The power of control over decedent estates and its descent and distribution is, as said above, very ample, and its police power once vested over estates of minors and the insane is very broad. If it conceived that personal statutory fiduciaries were, on the whole, far less reliable and safe than trust companies, there would seem no obstacle to its forbidding the former. I think that the tendency of these times is so greatly towards this form of protection that it is not unlikely that we shall see many legislative enactments for its advancement in derogation of the individual fiduciary.

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15. 27 Henry VIII, c. 10.

16. *Sinking Fund Com'r v. Walker* (1842), 6 How. (Miss.) 143, 185, 38 Am. Dec. 433.

## CHAPTER IV

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### Qualification of Trust Company to Assume Fiduciary Functions

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§ 13. Preliminary. It has been shown that a statutory trust company may exercise the powers of a fiduciary, whether according to the strict relation of trustee and *cestui que trust* or as the holder of funds or property belonging to or for the benefit of another where obligation and duty are defined by statute. It is seen, further, that it is not inconsistent in law, that a trust company shall be vested with other powers. In this regard they are not unlike individuals who, however otherwise occupied in the affairs of life, are not deemed unfitted for the law reposing in them all trusts of defined or discretionary duties, indeed, it might be said their experience in their own affairs is looked to, to ascertain their fiduciary fitness. Moreover an institution which serves many lines is independent of business conditions in any single branch of commerce.

With the corporate fiduciary there is more than in the case of a personal fiduciary, an implied, if not an express, warranty of fitness, because it applies, or holds itself out, for appointment, while the other is deemed to have a trust thrust upon him. Thus an old English

case<sup>1</sup> is quoted from by our Federal Supreme Court,<sup>2</sup> where the Lord Chancellor said: "I like not that a man should be ambitious of a trust where he can get nothing but trouble by it." Our court applied the sentiment thus expressed, notwithstanding that the American rule, as distinguished from the so-called "English Rule," allows compensation to a trustee, in the absence of provision therefor in the trust instrument.<sup>3</sup> It could not be objected to a trust company that it "should be ambitious of a trust," where it only is thus because of the compensation therein.

§ 14. **Necessity That Trust Company Should Receive Compensation.** The rule is quite familiar that the contracts of surety companies in the business of furnishing indemnity bonds, are more strictly construed against them than in the cases of personal voluntary sureties, the rule *strictissimi juris* being held not applicable to the former.<sup>4</sup> And as a corporate fiduciary is given particular power as a business agency it naturally would be deemed not only in accordance with, but in strict requirement of, public policy, that it should earn in the exercise of that power such compensation as will maintain its solvency. Such a fiduciary's duties are *publici juris*. Like the compensation to which a common carrier or an insurance company,<sup>5</sup> it not only is entitled to charge, but may be required to charge reasonable

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1. Uvedale v. Ettrick (1682), 2 Ch. Cas. 130.

2. May v. May (1897), 167 U. S. 310, 42 L. Ed. 179.

3. "Trust Estates as Business Companies," Sec. 131 and cases cited.

4. Justice v. Empire State Surety Co. (1913), 209 Fed. 105; Federal Union Surety Co. v. McGuire (1914), Ark. 163 S. W. 1171; State v. Massachusetts Bonding & Ins. Co. (1915), 91 Kan. 74, 136 Pac. 905; Lackland v. Renshaw (1914), 256 Mo. 133, 165 S. W. 314.

5. German Alliance Ins. Co. v. Lewis, *supra*.

compensation for its services and the risk involved. All of the things so well expressed in *Re Clark*<sup>6</sup> as reasons for the acceptance of a statutory trust company as a surety,<sup>7</sup> imply or may imply duty by the state to see to its continuing solvency.

The visitorial power is to be exercised not as to a particular estate but with regard to the qualifications of such companies engaged in the business of executing trusts. Therefore, naturally it would not permit such a company to serve without compensation and thus imperil its solvency. By like token it could demand that it charge reasonable compensation.

**§ 15. Oath by Statutory Fiduciary Unnecessary.**

I think it generally may be stated that a trust instrument may either require or waive requirement of oath by the trustee before entrance upon his duties and it is only where an oath is required for induction into office of a statutory fiduciary that I need here consider. Generally it was said in the Girard case:<sup>8</sup> "Let us proceed to the inquiry whether the corporation of the city can take real and personal property in trust. Now, although it was in early times held that a corporation could not take and hold real or personal estate in trust upon the ground that there was a defect of one of the requisites to create a good trustee, viz., the want of confidence in the person; yet that doctrine has been long since exploded as unsound and too artificial, and it is now held that where the corporation has a legal capacity to take real or personal estate, there it may take and hold it upon trust in the same manner and to the same extent as a private person may do."

6. 195 Pa. 520, 46 Atl. 127, 48 L. R. A. 587.

7. § 11, ante.

8. *Vidal v. Girard* (1844), 2 How. (43 U. S.) 127, 187, 11 L. Ed. 205.

In a Minnesota case the objection went to a corporation's inability to qualify that "it could not take the necessary oath," the Minnesota statute providing for corporations acting as guardians of estates of insane persons.<sup>9</sup> The court reasons out the matter according to the holding in the Girard will case, alluding to evasion in England of this technical difficulty by the corporation naming an agent called a "syndic" to whom letters were issued.

The "syndic" rule, however, as applied in England presents many difficulties and a sort of ratiocination as to vesting of title in the "syndic" and his dying or ceasing his connection with the corporation, all of which is inconsistent with the plain terms of statute conferring powers on trust companies. For an interesting summary of these difficulties I refer to a late English publication.<sup>10</sup>

The requirement of statutes as to the taking of oath by individual fiduciaries is after all mere machinery of the law, and would not, I think, make their appointment void, where entrance upon office is in every other respect regular. To this effect it was ruled against the contention that one was never an administrator because he did not take the oath of office at the time of his appointment and the issuance of letters of administration. The court said: "The letters issued by order of the court justified respondent in his acts as administrator, and furnished ample protection to all parties dealing with him as such. The irregularity in the grant of the letters of administration cannot be taken advantage of in a collateral pro-

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9. *Minnesota Loan & Trust Co. v. Beebe* (1889), 40 Minn. 7, 41, N. W. 232, 2 L. R. A. 418.

10. Allen on "The Law of Corporate Executors and Trustees" (1906).

ceeding. The letters must be regarded as valid until they are revoked."<sup>11</sup> But, however, this might be ruled as to a personal appointee, the fact is that a statutory trust company is vested with express power to accept the office of fiduciary and if it cannot take an oath, the statute does not require the impossible, and as held in *Re Clark*<sup>12</sup> it comes under the rule of lawful discrimination between corporations and individuals. The rule as to executors and administrators applies to guardians failing to take oath of office.<sup>13</sup>

#### § 16. Qualification by Deposit of Securities.

The giving of a bond by an executor anciently was not the rule, but chancery assisted in this respect merely for better protection,<sup>14</sup> but testamentary provisions may dispense with the requirement of a bond.<sup>15</sup> An administrator universally is required to give bond, but omission to do so does not make his appointment void or subject to collateral attack.<sup>16</sup> The same rule applies to failure by guardians to give bond.<sup>17</sup>

It must be deemed, therefore, largely a directory provision of the statute that any such appointee as an

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11. *Gallagher v. Holland* (1888), 20 Nev. 164, 167, 18 Pac. 834. See, also, *Brooks v. Walker* (1848), 3 La. Ann. 150; *Dayton v. Johnson* (1877), 69 N. Y. 419.

12. 195 Pa. St. 520, 46 Atl. 127, 48 L. R. A. 587.

13. *Way v. Levy* (1889), 41 La. Ann. 447, 6 So. 661.

14. *Slanning v. Style* (1734), 3 P. Wms. 334, 24 English Reports 1089.

15. *Bowman v. Wooton* (1847), 8 B. Mon. (Ky.) 67; *Amiss v. Williamson* (1881), 17 W. Va. 673.

16. *Leatherwood v. Sullivan* (1886), 81 Ala. 458, 1 So. 718; *Ions v. Harbison* (1896), 112 Cal. 260, 44 Pac. 572; *Harris v. Chipman* (1893), 9 Utah 101, 33 Pac. 242.

17. *In re Chin Mee Ho* (1903), 140 Cal. 263, 73 Pac. 1002; *Cuyler v. Wayne* (1879), 64 Ga. 78; *Hunt v. Insley* (1895), 56 Kan. 213, 42 Pac. 709; *Howerton v. Sexton* (1889), 104 N. C. 75, 10 S. E. 148.



administrator or a guardian should give bond, and under the principle of distinction between corporations and individuals as fiduciaries, it remains to be considered, whether some substitute for an individual's bond with personal sureties may be taken, under express statutory authority, security in lieu of such bond.

The general bond of a public administrator suffices instead of a bond in each estate administered,<sup>18</sup> and even it has been held that the official bond of a sheriff will cover an administration committed to him *ex officio*. If as between individuals as officials and individuals in their private capacity distinction in requirement to qualification as a statutory fiduciary may be made, *a fortiori* it may be urged that there may be made distinction between persons and corporations in this regard.

It amply appears, from cases hereinbefore referred to, what are the reasons for distinction between corporate trustees and personal trustees in the giving of bonds, and these cases need not again be cited. A state may control the devolution of property of decedents, even to the extent of forbidding all right of inheritance therein,<sup>19</sup> and therefore whatever discriminations made by the law as to the rights of parties in a decedent's estate do not violate due process of law.<sup>20</sup>

**§ 17. Consolidation, Merger and Successorship of Trust Companies—Status With Reference to Fiduciary Business of Constituent Companies.** This would be a matter of ordinary corporation law, were it not for the rule that the duties of a trustee imply per-

18. *Healy v. Lassen County Super. Ct.* (1900), 127 Cal. 659, 60 Pac. 428; *Buckley v. McGuire* (1877), 58 Ala. 226; *State v. Purdy* (1877), 67 Mo. 89.

19. *Plummer v. Coler* (1900), 178 U. S. 115, 44 L. Ed. 998.

20. *Magoun v. Illinois Trust & Savings Bank* (1898), 170 U. S. 283, 42 L. Ed. 1037.

sonal confidence and cannot be assigned to strangers. For that reason it is frequently necessary to consider whether a consolidation leaves the constituent companies in existence, and if not whether the new corporation can administer the fiduciary business committed to its predecessors. This is largely a matter of construing the statutes of a particular state, for "any consolidation, purchase or merger by which it (a trust company) acquires the franchises of another corporation must \* \* \* have statutory authority."<sup>21</sup> In the decision from which this is quoted the court held that the consolidation of two trust companies under the Illinois statute effected the dissolution of the original corporations and brought a new corporation into existence "possessing the property rights and franchises and assuming the liabilities of those passing out of existence." The issue in that case was whether the consolidated company must pay a state tax for its increased capital or on its entire capitalization. As it was held that a new corporation was created, a fee on the entire capital was exacted.

In another Illinois case,<sup>22</sup> it was held that one appointing a trust company in a fiduciary capacity impliedly authorizes its successor by consolidation to execute the trust. There the court said:

"The material question here is whether the general rule that a trustee cannot delegate his authority to another is an obstacle to the exercise of a power by the appellee to act as executor or trustee, where one of the constituent corporations was named as such. That general rule rests upon the ground that the selection of a

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21. *Chicago Title & Trust Co. v. Doyle* (1913), 259 Ill. 489, 102 N. E. 790.

22. *Chicago Title & Trust Co. v. Zinser et al.* (1914), 264 Ill. 31, 105 N. E. 718.



trustee implies personal confidence in his discretion and judgment. If a power is given to an executor or trustee which is not ministerial, or given for the purpose of executing a declared trust, which the court can enforce, but which involves the exercise of discretion and judgment, the power cannot be delegated or transferred to another either by the trustee or a court. The rule, however, cannot be applied to the case of a corporation, because the element of trust in the judgment and discretion of an individual is entirely wanting. A corporation is without personality; and if it is selected as trustee or executor, there can be no reliance upon individual discretion or even upon the continuance of the same administration. Etta Nelson, in naming the Real Estate Title & Trust Co. as executor and trustee, knew that its directors, officers, and stockholders might change from time to time, and that the statute authorized a change of name or place of business, enlargement, or change of the object for which the corporation was formed, an increase or decrease of capital stock, or change in the number of shares or par value, increase or decrease of the number of directors, and the consolidation of the corporation with any other corporation then existing or that thereafter be organized. She therefore contemplated that these changes might occur, and that the Real Estate Title & Trust Co. might be consolidated with some other corporation such as the Chicago Title & Trust Co., and that it would thereby cease to exist, and become a component part of the new corporation."

Under the New York statute it was held<sup>23</sup> that a merger extinguished the merged trust company (The

23. *Matter of Bergdorf* (1912), 206 N. Y. 309, 99 N. E. 714. affirming 149 N. Y. App. Div. 529, 133 N. Y. Supp. 1012.

Morton Company) so that the successor trust company (The Guaranty Company) could not validly base an application for letters testamentary to an estate to which the merged corporation had been appointed as executor, upon the ground that it was a continuation of or identical with the merged corporation. But the court found, on other grounds, that the letters should issue to the successor trust company. They said: "The testator in making the will and appointing the executors was and remained throughout the following years of his life subject to the relevant existing statutes.<sup>24</sup> The right to make a testamentary disposition of property is not an inherent right; nor is it a right guaranteed by the fundamental law. Its exercise to any extent depends entirely upon the consent of the Legislature as expressed in their enactments. It can withhold or grant the right, and if it grants it, it may make its exercise and its extent subject to such regulations and requirements as it pleases. It may declare the rules under which the administration of the estate may be committed to executors and make compliance with them mandatory. A testator intends and must be deemed to intend the results which the operation of those rules produce. They affect the testamentary disposition and provisions as though embodied in the will; and in case the cited sections of the Banking Law provide that the merger of the Morton Company transferred to the Guaranty Company the right, privilege or interest, if any, which the designation of it as an executor originated and thereby entitled the latter to the executorship, thus it was that the testator intended.

In reading the sections we do not regard the intention of the testator, but that of the Legislature. Their

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24. Compare *Matter of Stikeman* (1905), 48 N. Y. Misc. 156.

language is broadly and conspicuously comprehensive. The merger transferred to the Guaranty Company "all and singular the rights, franchises and interests of" the Morton Company "in and to every species of property, real, personal and mixed, and things in action thereunto belonging," and empowered the Guaranty Company to "hold and enjoy the same and all rights of property, franchises and interests in the same manner and to the same extent" as the Morton Company would if it "should have continued to retain the title and transact the business of" the Morton Company. This language means not only that every right, privilege, interest or asset of conceivable value or benefit then held by the Morton Company (except the right to be a corporation) should pass into and be absorbed by the Guaranty Company, but also that every right, privilege, interest or asset of conceivable value or benefit then existing which would inure to the Morton Company under an unmerged existence should inure to the Guaranty Company. Nothing appertaining to the Morton Company was to be lost, forfeited or destroyed.

The designation of the Morton Company as an executor created a privilege or an interest in the estate of the testator appertaining to that company. The privilege or interest was not complete or vested; it was incomplete, potential and ambulatory. From it, undisturbed until the testator's death, issued the absolute interest of an executorship and the power to participate in the control and administration of the testator's estate and receive the legal fees and commissions. That interest had no source of origin other than the will and the designation. The testator's death did but complete and vest that which theretofore existed. It existed, although in an incom-

plete, imperfect and dependent condition, from the making of the will and at the time the merger of the Morton Company was consummated. Ignorance on the part of the Morton Company of its existence did not affect it. Through it that company would have been an executor and entitled to the letters testamentary if it had "continued to retain the title and transact the business of such corporation." The merger transferred it to the Guaranty Company and in effect substituted that company for the Morton Company. The Guaranty Company was entitled to hold and enjoy it even as would the Morton Company under an unmerged existence. By virtue of the statute, effective as a part of the will, the Guaranty Company was designated as an executor, and as such is entitled to receive the letters testamentary."

Since the above decision was rendered the New York Banking Law has been amended, so as to specifically provide for the result reached by the court.<sup>25</sup>

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25. New York Banking Law, Sec. 188, Subdivision (1) Appendix, page 289.

## CHAPTER V

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### Diversity and Limitations of Powers, Ultra Vires

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#### § 18. Powers of Trust Companies in General.

It seems not altogether necessary in a work, where mainly are considered powers of statutory trust companies, under specific conferring of authority, to treat of a corporation's general power to become a trustee. But if we ascertain either that it may generally upon appointment be vested with the title and powers of a trustee, or that such vesting will pass if its purposes are "germane to the objects of the incorporation," or "relating to matters which will promote and aid and perfect those objects,"<sup>1</sup> then we are assisted in construing statutory terms claimed to authorize such companies to become trustees. Even though a corporation is not expressly empowered to become a trustee, it may be such where it has any interest, direct or indirect, in the administration of a trust,<sup>2</sup> and the converse is true, that where it has no interest and the purposes of the trust are wholly foreign, it cannot take as trustee.<sup>3</sup>

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1. *Vidal v. Girard* (1844), 2 How. (43 U. S.) 127, 11 L. Ed. 205; *Jones v. Habersham* (1883), 107 U. S. 174, 189, 27 L. Ed. 401.

2. *Sheldon v. Chappell* (1888), 47 Hun. 59, 13 N. Y. S. N. Y. S. 35.

3. *South New Market M. Seminary v. Peaslee* (1844), 15 N. H. 317.

While it, of course, is true, that ordinarily what are called Trust Companies, may, and, as I have suggested, should be organized for other than merely trust purposes, yet so far as a department of their business extends, the word "trust" would seem to have the meaning it has at common law.

Thus it was said by the Supreme Court of Missouri<sup>4</sup> that: "The fact that respondents are incorporated as trust companies seems to be inconsistent with the relation of that of debtor and creditor, and in favor of the relation of trustee and *cestuis que trust*," and: "Trust companies have no right to receive deposits (construing its own statute), but can only receive money in trust and thereby the relation of trustee and *cestuis que trust* is established between the company and the customer."

This is well illustrated in a late case in the supreme court of Wisconsin.<sup>5</sup> It appears in this case that the state commissioner of banking took possession of all of the property of a statutory trust company, and actions were brought for the appointment of trustees. The several plaintiffs stood to the company as follows: One claiming assets in the hands of the commissioner through a trust deed executed to the company to secure indebtedness; another, that the company was trustee under a will and as such trustee had invested moneys of the estate in inadequate security; the third, the same as the first. They also sued in behalf of numerous *cestuis que trustent* who were scattered. The complainants claimed that the commissioner had no right to administer said trusts and they asked for the appointment of

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4. State ex rel. v. Lincoln Trust Co. et al. (1898), 144 Mo. 562, 46 S. W. 593.

5. Sullivan v. Kuolt (1914), 156 Wis. 72, 145 N. W. 210.



another suitable trustee. The trial court sustained a demurrer to the several complaints.

The Supreme Court said: "The Trust Company was engaged in business of various kinds, among others that of executing trusts, whether such only was imposed on it by a court by agreement of parties or by operation of law. Whenever in the opinion of the commissioner of banking it becomes insolvent or unsafe, it is his duty to take charge of its property and its business. But for what purpose does he take charge of it? The statute is explicit on this point. It is for the purpose of liquidating it, and not for the purpose of carrying it on. \* \* \* The whole statutory scheme is to wind up the business of the insolvent corporation as soon as is consistent with good business management. But it must be liquidated and closed, that being the purpose for which possession is taken. To do that, he must settle with the *cestuis que trustent*, or a new trustee, and turn over the unexecuted part of the trust to them or him. He must also settle with every other creditor of the Trust Company. This implies two parties: on the one hand the commissioner of banking, representing the stockholders of the Trust Company as well as the creditors generally, and on the other, the party settled with—in the case of numerous *cestuis que trustent* most conveniently their trustee. \* \* \* Some of the trusts set out in the complaints will by their terms, continue for many years and call for duties wholly foreign to that of the commissioner of banking." The court further says the insolvency and the taking over of the business of the company "terminated its trust capacities, and its disqualification to act as trustee still exists."

This opinion seems to me to involve that the trust

relations of a statutory trust company will be considered wholly apart from its other business and that insolvency or dissolution will work a cessation of its trusteeship. While death of an individual trustee does the same thing, his insolvency does not, nor should corporate insolvency unless there is also a taking possession of its property. The Wisconsin court also observed in the course of its discussion that: "Of course, upon taking possession the commissioner of banking holds all the property and business of the corporation, including trust property, for a reasonable time until new trustees can be appointed to take charge of and execute the various trusts. And while he so holds the trust property, it is his duty to conserve and protect it as far as possible until new trustees can be appointed." The court here was merely indicating what could be done in a sort of interregnum when there would be possession taken as where an individual trustee dies and his executor or administrator takes possession.

Just here it seems to me is an important distinction between an individual trustee and a corporate trustee, so far as title and successorship are concerned, which I will discuss hereinafter.

The fact that one of the features of a statutory trust company is that it is a fiduciary is strongly stressed in a late Missouri case, where its engagement virtually was to act as trustee of another corporation. The court said: "The hazards of such a venture are altogether repugnant to the purposes for which the Missouri Company was formed, which included the handling and investing of the money of others, executing trusts under deeds and wills, acting as guardians of infants and insane persons, and guaranteeing the fidelity of persons holding places of



public or private trust; all requiring the maintenance of a high standard of credit and stability on the part of that company. It is impossible to escape the conclusion that the purchase of the Kansas Company's stock was beyond the powers of the Missouri company."<sup>6</sup> This view indicates that the fiduciary character among its powers affects, as a matter *publici juris*, the private contractual powers of the corporation.

In a Kentucky case<sup>7</sup> there is a discussion relating particularly to a trust company as an administrator, but the reasoning covers its fiduciary relation in all respects. It is important as showing that the interests of distributors of an estate are apart from that of the trust company and are not governed by the principle that knowledge by an officer where he is acting adversely to the corporation is not notice to the corporation. The court said: "Necessarily it (the corporation) acts only through its official boards. It must be held to contract with all entrusting to it such business, that it will select men of prudence, judgment, honesty and reasonable skill in these places; and that they will bring to the discharge of their duties to these estates not only their skill, but that whatever knowledge they may have wherever and whenever obtained, will be used to protect these interests exactly as if they were acting personally as such administrators or trustees."

The principle here decided goes to the very heart of the question of like responsibility of corporate trustees to that of individual trustees. Indeed, if these statutory trust companies could be thought to acquire any real title

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6. Richard Hanlon M. Co. v. Mississippi Valley Trust Co. (1913), 251 Mo. 553, 158 S. W. 359.

7. Germania S. V. & Trust Co. v. Driskill (1902), 23 Ky. L. Rep. 2050, 66 S. W. 610.

to fiduciary property in their hands and thus make the principle as to notice above alluded to apply, the interrelations between their trust business and their other business would become such that their liability as trustees would become a delusion and a snare and personal delinquency of their officials constitute in many cases a sure defense.

What the court further says on this subject is so very admirable that it ought to be reproduced, which I do as follows: "In the state of case in hand the administrator, i. e., the trust company, can only have such knowledge as is in the brain of its officials or in the records that its servants have made for it. The administrator's caution is the caution exercised by these officials. Its conscience is their conscience. It will not be heard to say, therefore, that it has selected negligent, or even rascally officials, who took up other duties so incompatible with their obligations to the administrator that they could not give the estate the full benefit of either their sagacity, their prudence, their judgment or their knowledge of affairs vitally affecting the trusts committed to them." The company therefore, was held affected by the knowledge of its president of a fraud he had perpetrated on another company making it insolvent thereby and unreliable as a place of deposit by the company of money belonging to the estate held by it as administrator.

A New Jersey case<sup>8</sup> is an excellent illustration of the fact that, if a trust company acts in another than a fiduciary capacity, the principle to which I have referred, viz.: that knowledge possessed by an officer acting in the perpetration of a fraud will not be imputed to the

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8. *Camden S. D. & Trust Co. v. Lord* (1904), 67 N. J. Eq. 489, 58 Atl. 607.

corporation in whose behalf he is acting, will not be applied.

A New Hampshire case<sup>9</sup> refers to discretion by a trust company as to deposit by a trust company of funds it held as trustee and shows that it was excused as to loss in securities back of the fund deposited just as would have been excused any other trustee.

**§ 19. Ultra Vires as Affected by Fiduciary Power in a Corporation.** As lending aid to the view that corporate trustees are held to a more restricted construction of their powers a New York case,<sup>10</sup> speaking directly on the same lines as the Missouri case *supra*<sup>11</sup> intimated, said, in effect that questions of *ultra vires* were treated very differently when they concerned merely a corporation organized for business or trading purposes than where they occupy a fiduciary position. Speaking of trust companies it was said their "powers and purposes are primarily fiduciary. Their primary work is of a trust capacity and to a large extent they take the place of individual administrators, executors, guardians, committees, receivers and trustees. They receive appointment from the courts in trust capacities without giving a bond. \* \* \* The courts, in considering the effect of *ultra vires* acts have always recognized the distinction between business and trading corporations and corporations whose purposes are largely fiduciary."

Further along this case says: "The legislature intended and the public interests demand that trust companies shall be confined not only within the words, but

9. Tucker v. Hampshire Trust Co. (1897), 69 N. H. 187, 44 Atl. 927.

10. Gause v. Commonwealth Trust Co. (1909), 196 N. Y. 134, 89 N. E. 476, 24 L. R. A. (N. S.) 967.

11. Richard Hanlon M. Co. v. Mississippi Valley Trust Co. (1913), 25 Mo. 551, 158 S. W. 359.

also within the spirit of the statutory provision which declares that a corporation shall not possess or exercise any corporate powers not given by law or not necessary to the exercise of the powers so given." This case was later expressly confirmed by that court.<sup>12</sup>

The fact that a trust company is acting *ultra vires* will not affect the validity of any trusts committed to it.<sup>13</sup> Equity never permits a trust to fail for lack of a qualified trustee. If a trustee named cannot act, the court will appoint some one else.<sup>13</sup>

That a trust company may not "take advantage of its own wrong" by itself pleading *ultra vires* has been held in a Missouri case,<sup>14</sup> and the principle of estoppel has been applied to prevent one who had made a note to a corporation as administrator from defeating recovery on the ground that the corporation was not authorized to act as administrator.<sup>15</sup>

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12. *Davidge v. Guardian Trust Co.* (1911), 203 N. Y. 331, 96 N. E. 751.

13. *Fitchie v. Brown* (1908), 211 U. S. 321, 53 Law. Ed. 769, 30 S. Ct. Rep. 515; *Dean v. Northern Trust Co.* (1913), 259 Ill. 148, 102 N. E. 244.

14. *First National Bank v. Guardian Trust Co.* (1905), 187 Mo. 494, 86 S. W. 109, 70 L. R. A. 79; see, also, *Creditors' Claim & Adjustment Co. v. Northwest Loan & Trust Co.* (1914), 81 Wash. 247, 142 Pac. 670.

15. *Union Bank & Trust Co. v. Wright* (1900) (Tenn.), 58 S. W. 755; but see *Continental Trust Co. v. Peterson* (1906) (Neb.), 107 N. W. 786, where it was held that the appointment of a corporation as an administrator was a mere nullity and subject to collateral attack.

## CHAPTER VI

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### Extension of Functions of Statutory Trust Companies, Banks, Agents, Guardians and Committees, Receivers and Assignees, Sureties, Guarantors and Underwriters.

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#### § 20. Corporation Limited to Charter Powers.

The well settled theory that an artificial being like a corporation is strictly limited in its powers has a seeming exception in the principle of acts done or abided by from which benefit is derived or presumed. But as shown above,<sup>1</sup> this exception is more strictly applied to corporations of a merely private nature and for business purposes. Often, however, corporations, whose business is *publici juris* and subject to regulation as such and not merely because their charters submit them to regulation, are ruled to be precluded from invoking the doctrine of *ultra vires* notwithstanding their acts or negligences may in the liabilities they reap seriously interfere with the performance of their public duties or the rights of their stockholders to fair remuneration upon invested capital, so often held by our supreme court to be a constitutional right.

This exception also has sometimes been applied as

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1. Sec. 19.

to governmental agencies, such as cities, counties and school districts, the usual test of validity being that a contract has been executed and the *status quo* cannot be restored. All of this, however, is but incidental to my present purpose, it being assumed that just as a charter is the limit of power, so generally by specific grant, it may confer power.

**§ 21. Principles of Construction of Trust Company Charters.** Maxims of construction are applied to the powers and rights of fiduciary companies in the same way as to other corporations for profit. They ask for their charters, and hence, when the language or intent is doubtful, it is construed against them, in conformance with the principle that ambiguity or doubt is decided against the proponent (*verba fortius accipiuntur contra proferentem.*) Legislative intent is sought.<sup>2</sup> Construction in the state from which an act is copied will be followed.<sup>3</sup> The express enumeration of powers excludes all others.<sup>4</sup> (*Expressio unius est exclusio alterius.*) Powers may be implied in so far as they are incident to express powers<sup>5</sup> (the principle carries with it its incidents); but not so as to include distinctly unauthorized activities.<sup>6</sup>

**§ 22. Organization Under General and Special Laws.** It has been held<sup>7</sup> that a corporation may be

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2. Steppacher v. McClure (1898), 75 Mo. App. 135.

3. State ex rel. Crow v. Lincoln Trust Co. (1898), 144 Mo. 562, 46 S. W. 593.

4. State ex rel. Hadley v. Bankers' Trust Co. (1911), 157 Mo. App. 557, 138 S. W. 669.

5. Killingsworth v. Portland Trust Co. (1890), 18 Ore. 351, 23 Pac. 66, 17 Am. St. 737, 7 L. R. A. 638.

6. Kavanaugh v. Commonwealth Trust Co. (1906), 64 N. Y. Misc. 303, 118 N. Y. Supp. 758.

7. State ex rel. Higby v. Higby Co. (1906), 130 Iowa 69, 106 N. W. 382.



organized "with power to act as trustee," under general statutes authorizing incorporation for "any lawful purpose," but it was conceded that it requires an express statute to empower a corporation to act as "guardian, administrator or executor."<sup>8</sup> Nearly all states now provide special acts under which fiduciary companies may be incorporated. Where this has been done, it is not permissible to organize under the general corporation laws for these special purposes.<sup>9</sup> In fact, a court will take a judicial notice that a domestic incorporated trust company is such only as provided by the special laws of the state governing trust companies.<sup>10</sup>

**§ 23. Trust Companies as Having Varied Powers.** The trust company in America generally is organized under the banking laws of a state, but in its banking feature it has more restricted rights than are accorded to a corporate bank or to an individual banker. For example, while a bank might issue bills, notes or other evidences of debt for circulation as money, receive deposits and commercial paper and make loans thereon, discount bills, notes or other commercial paper and buy and sell gold or silver bullion, foreign coins and bills of exchange, a trust company may receive deposits of money and other personal property, issue its obligations therefor and loan money on real or personal securities. This is the distinction found in New York law,<sup>11</sup> which I think is generally the case as to other state statutes.

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8. On this latter point see *Continental Trust Co. v. Peterson* (1906) (Neb.), 107 N. W. 786.

9. *State v. Nichols* (1905), 40 Wash. 437, 82 Pac. 741. See, also, *McCarter v. Imperial Trustee Co.* (1905), 72 N. J. L. 42, 62 Atl. 223.

10. *Wycoff v. Epworth Hotel Const. & Real Estate Co.* (1910), 146 Mo. App. 554, 125 S. W. 550.

11. *Jenkins v. Neff* (1902), 186 U. S. 230, 46 L. Ed. 1140; but banking powers of trust companies in New York have been extended since this decision, see Appendix, page 256.

In New York a trust company also may buy and sell stocks, bonds, mortgages and bills of exchange.

But the business necessities of our civilization have called them into existence for various other things not of a banking nature. The enumeration of these things is of great particularity. The New York statute provides in substance as follows: (1) To act as fiscal or transfer agent of any state, municipality body politic or corporation; (2) To receive deposits of trust moneys, securities and other personal property; (3) To act as trustee under any mortgage issued by any body politic and generally to accept and execute any municipal or corporate trust; (4) To accept trusts of married women as to their separate property and manage same as their agent; (5) To accept judicial appointments as guardian, receiver or trustee of the estate of any minor and to become the depositary of moneys paid into court for the benefit of any person or corporation; (6) To accept and execute all legal trusts confided to it by any court of record, person or corporation whether by grant, assignment, devise, bequest or other authority; (7) To be appointed executor or trustee under a will, administrator with or without will annexed and committee of estates of lunatics, idiots, persons of unsound mind and habitual drunkards, it being provided that no official oath shall be required in the premises. It is also provided generally that no security shall be given by such trustee, unless a court so orders in a particular case, and all debts due by the company in these appointments are regarded as trust fund debts and to have preference over its other debts. Some state laws provide for deposit with a state officer of securities as to these funds or this property,



It is seen from the above enumeration that none of the things pertain to banking and all of them are of a trust nature, except the first, and that is so very much associated with the others in the usual statute, that it will receive discussion hereinafter.

It becomes apparent from reading the above enumeration that a trust company entitled to exercise all of the conferred powers needs all of the implied powers, which go with their grant, that is to say, everything reasonably necessary to effectuate the purpose of the grant. There may be a limitation on power in an instrument creating a trust which would apply in the same way as were the trustee an individual and in the same way, where the company is appointed to a statutory office, it is bound as an individual is bound. Also under the general principles of equity marks may be set to discretion. With these, however, it would seem that a trust company is to be like an individual except that, under New York law, and possibly under the law where securities are given, there is to be no tracing of trust funds in the hands of the trustee or of that in which it may be invested. This question I will advert to in another part of this work.

Though the charter or statutory powers of trust companies must be wide enough to enable them to perform the many special services for which they are equipped, public consideration may rightfully demand that they be (a) confined within powers properly exercisable by an organized impersonal entity; (b) that they be kept from speculative enterprises apt to impair their responsibility (c) and within powers that are conformable to public supervision and regulation.

§ 24. **Trust Companies as Banks.** Generally the legal questions applicable to trust companies as banks are the same as those pertaining to state and national banks.<sup>11½</sup> For that reason they are sufficiently treated in works devoted to banking law. There is no occasion to amplify these pages with discussion of purely banking matters, and we will, therefore, content ourselves with a brief consideration of what activities constitute "banking" by trust companies and what implications are raised with respect to their manner of exercising banking functions.

It was held by the United States Supreme Court<sup>12</sup> that a trust company was not doing a "banking" business, within the meaning of the revenue laws, where its "only business has been and is the investing of its own capital in mortgage securities on real estate, and selling such mortgage securities with the company's guaranty." In this case the court said:

"In no proper sense can it be understood that one receives his own stocks and bonds, or bills, or notes, for discount or for sale. He receives the bonds, bills or notes belonging to him, as evidences of debt, though he may sell them afterwards. Nobody would understand that to be banking business. But when a corporation or natural person receives from another person, for discount, bills of exchange or promissory notes belonging to the other, he is acting as a banker; and when a customer brings bonds, bullion or stocks for sale, and they are re-

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<sup>11½</sup>. A trust company authorized to do a general banking business has "every implied power that any bank would have so far as not prohibited by the express terms of the Act governing trust companies." It may take over the business of a debtor to save the debt. *Union Savings & Trust Co. v. Krumm* (1915), 88 Wash. 20, 152 Pac. 681.

<sup>12</sup>. *Selden v. Equitable Trust Co.* (1877), 94 U. S. 419, 24 Law Ed. 249. See, also, note on "Acts Constituting Doing 'Banking' Business" in 18 Am. & Eng. Anno. Cas. 829.

ceived for the purpose for which they are bought, that is, to be sold, the case is presented which we think was contemplated by the statute. In common understanding, he who receives goods for sale is one who receives them as an agent for a principal who is the owner. He is not one who buys and sells for his own account.

The Equitable Trust Company lent its own money, taking bonds and mortgages therefor. Those bonds it sold with a guaranty. It sold its own property, not that received from others for sale. Such a business, in our opinion, did not constitute the corporation a banker, as defined by the revenue laws."

In a Missouri case<sup>13</sup> it was held that: "An examination of the authorities will, we think, demonstrate that the mere fact that a corporation is authorized to exercise some of the functions of a bank does not, in law and in fact, create it a bank." The court then cites a federal decision<sup>14</sup> wherein an express company having many banking powers was held technically not to be a bank. But, however this may be with reference to particular acts and particular laws more or less restricted to banks, the better rule appears to be that trust companies will be re-regarded as coming under banking regulations and supervision for the maintenance of their solvency.<sup>15</sup>

The implied power of a trust company to operate a savings department, with pass books and rules similar to a savings bank, was gone into at great length in a New York case.<sup>16</sup> The court decided that this was a lawful

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13. *State v. Reid* (1894), 125 Mo. 43, 28 S. W. 172. See, also, *Dunn v. State* (1913), 13 Ga. App. 361, 79 S. E. 170.

14. *Wells Fargo & Co. v. Northern Pacific Railway Co.* (1884), 23 Fed. 469.

15. See Section 138 of this book and cases there cited.

16. *People v. Binghamton Trust Co.* (1893), 139 N. Y. 185, 34 N. E. 898.

exercise of detail in its banking functions. The formulation of the rules by which what would be an ordinary deposit was made subject to withdrawal on certain conditions, with addition of interest, was merely "A reasonable and prudential agreement as the basis of its relations with a depositor."

Similarly the issuance of certificates of deposit is but a detail incident to a trust company's general power to receive deposits.<sup>17</sup>

**§ 25. Trust Companies as Agents.** The business of agency is a lawful purpose for corporations organized under general laws,<sup>18</sup> though certain kinds of agency are frequently confined to corporations organized under acts solely applicable to fiduciary companies.<sup>19</sup> The agency powers of trust companies have been accepted, without question, except the point raised in an Oregon case.<sup>20</sup> There it was argued that a trust company empowered by its articles of incorporation "to act as the general or special agent, or attorney in fact, for any public or private corporation or person in the management and control of real estate or other property, its purchase, sale or conveyance," etc., could not execute a deed of conveyance of real property as the attorney in fact for another, because a corporation can only act through agents, and the power of attorney gave no authority for substitution. Of this contention the court

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17. *Bank of Saginaw v. Title & Trust Co.* (1900), 105 Fed. 491; a seemingly contrary decision was under a statute specifically prohibiting all corporations except banks from issuing evidences of debt upon loans. *New York Life Insurance & Trust Co. v. Beebe* (1852), 7 N. Y. (3 Seld.) 364.

18. *State v. Michel* (1904), 113 La. 4, 36 So. 869.

19. See *New York Law Appendix*, page 286.

20. *Killingsworth v. Portland Trust Co.* (1890), 18 Ore. 351, 23 Pac. 66, 7 L. R. A. 638.

said: "When a corporation is invested with a power of attorney to sell and convey real property, the person conferring the power knows that the corporation cannot act personally in the matter, but that in performing the engagement it will act through its agents, who for that purpose are its faculties, and whose acts in the discharge of that duty are the acts of the corporation, and as such must be considered to be included in the artificial person, as instrumentalities authorized by him to do the act conferred upon it by his power of attorney. In this view, the argument that the corporation cannot do such act, under the power of attorney, without a delegation of authority to its agents, and that the grantor of the power has given no such power of substitution, cannot be sustained."

In addition to acting as attorneys in fact, trust companies act as transfer agents,<sup>21</sup> fiscal agents and agents for reorganizations. Its status as a reorganizing agent will depend upon the terms of the agreement under which it is appointed. This frequently consists of acting merely as a depository,<sup>22</sup> or it sometimes assumes obligations of a combined trusteeship and agency with express provisions limiting its liability.<sup>23</sup>

**§ 26. Trust Companies as Guardians and Committees.** Trust company laws usually provide specifically for these powers, but in the absence thereof, it has been held that the general power to execute trusts of

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21. See Chapter X of this book.

22. See Sections 79-80 of this book.

23. *Gernsheim v. Central Trust Co.* (1891), 16 N. Y. Supp. 127. For construction of clauses in reorganization agreements for protection of committee, etc., see, also, *Van Sicklen v. Bartol* (1899), 95 Fed. 793, and *Mawhinney v. Converse* (1907), 117 N. Y. App. Div. 255, 102 N. Y. Supp. 279, affirmed without opinion in 189 N. Y. 501, 81 N. E. 1169.



any description include the power of guardianship and committee.<sup>24</sup>

In *Brown v. Threlkeld's Guardian* (1913), 154 Ky. 833, 159 S. W. 595, where a corporation amended its articles so as to provide: "The nature of the business carried on and conducted shall be a general banking and trust business, as provided by chapter 32 of the Kentucky Statute 1903, relating to corporations, banks, trust companies, and combined banks and trust companies, or such parts thereof as shall apply to corporations of that character," it was authorized to act as guardian as the statutes referred to provided for this power.

The constitutionality of laws providing for corporate guardianship was passed upon in Minnesota<sup>25</sup> as follows:

"The contention of counsel seems to be that the Legislature has no right to grant to any corporation the power to act in any such fiduciary capacity. His argument deals in much criticism and denunciation of the statute, some of which might have some weight if addressed to the Legislature; but he entirely fails to point out any provision of the constitution with which it conflicts. The sum of his argument is that such a statute is derogation of the common law, or conflicts with prior statutes, and is impolitic. But none of these considerations goes to the question of the validity of the act. With our preconceived ideas on the subject, it might seem somewhat inappropriate to intrust the person of a minor to the custody of a corporation; but perhaps experience will prove that the objections to this are largely artificial and imaginary."

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24. *Equitable Trust Co. v. Garis* (1899), 190 Pa. St. 544, 42 Atl. 1022, 70 Am. St. Rep. 644; *Glaser v. Priest* (1888), 29 Mo. App. 1.

25. *Minnesota Loan & Trust Co. v. Beebe* (1889), 40 Minn. 7, 41 N. W. 232, 2 L. R. A. 418.

In *Murphree v. Hanson* (1916), 72 So. 437, the Supreme Court of Alabama held that trust companies may act as guardians of the estate, but not of the person if a minor, guardianship of the person being a personal relation.

The appointment of a trust company as guardian of an infant's estate was upheld as a proper exercise of the Surrogate's discretion in a case where two sisters filed counter petitions, and it appeared that the estate was large and that there were family disputes and differences.<sup>25½</sup>

It has been observed that good practice requires that a trust company file a duly acknowledged consent to act as a guardian, since it is not obliged to file an oath or bond, and otherwise there would be no formal evidence that it had entered upon the discharge of its duties.<sup>25¾</sup>

**§ 27. Trust Companies as Receivers and Assignees.** The power to act as receiver or assignee is entirely dependent upon statute. It has been held that this capacity cannot be questioned after the decree appointing the corporation has been affirmed by the court of last resort.<sup>26</sup>

In appointing a trust company as receiver, judges not only feel that they are obtaining the services of those specially trained and equipped for the work, but that the security is greater, and the element of personal favoritism will have less play. Thus it was remarked in

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<sup>25½</sup>. *Matter of Buckler* (1904), 96 N. Y. App. Div. 397, 89 N. Y. Supp. 206, and see *Matter of Wyckoff* (1910), 67 N. Y. Misc. 1, 124 N. Y. Supp. 625, where a trust company was appointed because of dispute between mother and son.

<sup>25¾</sup>. Heaton on Surrogates' Courts, p. 499.

<sup>26</sup>. *Roby v. Title Guarantee & Trust Co.* (1896), 166 Ill. 336, 46 N. E. 1110.



an early case,<sup>27</sup> wherein a trust company was appointed receiver, that:

“The United States’ Trust Company, and several highly respectable individuals, have been nominated to discharge the trust. As no mere personal obligation can be equal to the mortgages and public stocks, to the amount of one million dollars, pledged as security by the trust company, and as that institution has been created by law, among other objects, for the express purpose of meeting such requirements, I can feel no hesitation in making a selection between the nominees. Private preferences, in this as in most other judicial acts, must yield to public considerations. No man, and the counsel of no man, has a right to complain that he or his particular friend is not appointed receiver; especially where the assets, as in these bank cases, to be entrusted to his responsibility, are counted, not by tens, but by hundreds of thousands. There are absent parties interested as well as those who are present—minors, too, as well as adults; and those who rely, and have a right to rely, exclusively and without professional intervention, on the care and vigilance, and unbiased judgment of the court.”

**§ 28. Trust Companies as Sureties.** The specific power to act as sureties is provided in the trust company laws of some states;<sup>28</sup> but generally this business as a corporate enterprise is confined to companies organized for this special purpose. When trust companies lawfully act as sureties they are governed by the same

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27. In the matter of the Empire City Bank (1855), 10 Howard's Practice (N. Y.) 498.

28. Colorado, District of Columbia, Indiana, Kansas, Michigan, Missouri, Montana, New Jersey, New Mexico, North Dakota, Pennsylvania, Utah. (This list is but illustrative and is not intended to be exhaustive.)

rules that apply to surety companies. For that reason this book does not treat of this subject but refers the reader to some of the many works on suretyships.<sup>29</sup>

**§ 29. Power of Trust Companies to Act as Guarantors.** The extent of a trust company's implied powers with respect to guaranty was thus summarized by the United States Supreme Court:<sup>30</sup>

"The purview of the words 'loan and trust' does not appear to have been defined by statute or decision in Kansas, but the declaration alleged that this company was organized 'for the purpose of transacting a general investment, loan and trust business, buying and selling commercial paper, obligations and securities,' and it must be assumed that *the general rule is applicable that such companies have no implied power to lend their credit, or to bind themselves by accommodation indorsements. They may guarantee paper owned by them, or paper which they negotiate in due course of business and the proceeds of which they receive, but the naked power to guarantee the paper of one third party to another is not incidental to the powers ordinarily exercised by them. The power as exercised here was certainly not 'essential to the transaction of its ordinary affairs,' nor within 'the legitimate objects of its creation.'* And so far as the question might be resolved by the usage in Kansas, the findings were adverse to plaintiff." (Italics supplied.)

An interest, which will remove the transaction from being a mere "accommodation," however, need not consist in absolute ownership. Thus it has been held that a trust company may become the guarantor of a bond

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29. Stearns' "The Law of Suretyship" (1903). See notes on Suretyship in L. R. A. in Am. & Eng. Anno. Cases and in 32 Cyc. 303.

30. Ward v. Joslin (1902), 186 U. S. 142, 46 L. ed. 1093.

of which it is trustee<sup>31</sup> and a trust company which was interested in financing a railroad had the implied power to endorse its notes,<sup>32</sup> though the court said: "It may be conceded that, under the powers conferred upon the defendant by the statutes under which it was organized, it would not be authorized to simply engage in the business of becoming a purely accommodation maker or endorser of promissory notes."

**§30. Trust Companies as Underwriters.** Underwriting as applied to securities, is a species of guaranty, by which the underwriter agrees that "in the event of the public not taking up the whole of them, or the number mentioned in the agreement, the underwriter will, for an agreed commission, take an allotment of such part of the shares as the public has not applied for."<sup>33</sup>

The participation of a trust company in an underwriting has been condemned as *ultra vires*, in a case growing out of the collapse of the ship building trust.<sup>34</sup> The New York Court of Appeals characterized the trust company's act as "a reckless and most unusual and hazardous agreement," that it created "a hazard so great as to involve the very life of the defendant, and in our (the Court's) judgment it was wholly without authority. The result of such hazardous and reckless dealings and acts by the officers of trust companies is well illustrated in this case, as it appears that the defendant was organized with a large capital and paid in surplus in the spring

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31. *McCauley v. Ridgewood Trust Co.* (1911), 81 N. J. L. 86, 79 Atl. 327.

32. *First National Bank v. Guardian Trust Co.* (1905), 187 Mo. 494, 86 S. W. 109, 70 L. R. A. 79.

33. *In re License Victuallers' Mut. Trading Ass'n*, 42 Ch. D. 1, 58 L. J. Ch. 467, 60 L. T. Rep. N. S. 684.

34. *Gause v. Commonwealth Trust Co.* (1909), 196 N. Y. 134, 89 N. E. 476, affirming 124 N. Y. App. Div. 438.

of 1902, and within a few months thereafter was shorn of its surplus and compelled to reduce its stock to a small part of the original issue, and it has still upon its hands this serious litigation. If such business methods are authorized by statute and approved by the courts the purpose of the organization of trust companies would fail and result in a trap to those invited by the legislature to submit to such corporations their fiduciary accounts."

As pointed out by the Court "The defendant (trust company) did not at any time become the owner of the bonds and stocks but the guarantor of a 'future' and in substance of the prosperity and success of the shipbuilding company." This situation is quite different, it appears to me, from where a trust company limits its participation in an underwriting to an amount and quality of security which it could lawfully purchase in its own behalf. It would then be exercising less than its full power, for its right to purchase outright must surely include the lesser power to purchase contingently.

## CHAPTER VII

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### Trust Companies as Trustees

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§ 31. **Trust Companies Generally Like Individual Trustees.** Trust companies in their general rights, duties and liabilities, as to trust funds in their hands in a fiduciary capacity are like individual trustees.<sup>1</sup> It is said in the Colorado statute regarding trust companies:<sup>2</sup> "In the exercise by said company of the powers herein authorized as guardian, executor, administrator, committee or conservator of lunatics, or of any office or duty imposed by any court, said company shall be subject to the same responsibilities, shall have the same powers and shall receive the same compensation as fixed by law with relation to individuals holding similar offices or trusts, except as hereinafter specially provided. The exercise of other powers and the performance of other duties may be as to compensation and otherwise matters of contract with the parties interested."

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1. *Matter of Long Island Loan and Trust Co.* (1904), 92 N. Y. App. Div. 1, 87 N. Y. Supp. 65, affirmed on opinion below in 179 N. Y. 520, 71 N. E. 1133, holding that a trust company acts against public policy in transferring its own securities to a trust fund, and must make the fund good with six per cent interest. See, also, *Indiana Trust Co. v. Griffith* (1911), 176 Ind. 643, 95 N. E. 573, 44 L. R. A. (N. S.) 873, holding trust company as guardian to same rules of investment as an individual guardian.

2. Colo. Anno. Stats. 1912, Sec. 290.

In Vermont it is specifically provided that a trust company may act as executor, administrator, guardian, assignee or trustee "under the same circumstances, in the same manner and subject to the same control by the court having jurisdiction, as a natural person."<sup>3</sup> Such provisions as these are inserted, so to speak, *ex industria*, for the fact that these companies merely are authorized by statute to serve like individual trustees carries the inference that they would be bound generally in the same way and have the same rights and duties as individual trustees. A trust, or an office in the nature of a trust, loses or acquires nothing according to the quality of the trustee. He or it is merely the executive of a trust and is continued, removed or discharged according to exigencies expressed in the trust or its termination. In the handling of the corpus or funds of a trust, however, statutes have introduced, by specific enactment, some changes applicable only to trust companies. These differences, however, are not supposed to affect the integrity and general management of trust funds and are more directory than otherwise.

**§ 32. Specific Provisions as to Integrity of Trust Funds.** There are provisions in many codes and rulings in many cases in regard to mingling of trust property by a trustee with his own,<sup>4</sup> such a practice being

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3. Vt. Pub. Laws 1910, Sec. 73.

4. Cal. Code 1906, Sec. 2236; *Line v. Lawder* (1889), 122 Ind. 548, 23 N. E. 758; *McIntire v. Bailey* (1907), 133 Ia. 418, 110 N. W. 588; *Clay v. Clay* (1861), 60 Ky. 548; *Bangor v. Beal* (1892), 85 Me. 129, 26 Atl. 1112; *Bobb v. Bobb* (1886), 89 Mo. 411, 4 S. W. 511; *Yellowstone County v. First Trust & Savings Bank* (1912), 46 Mont. 439, 128 Pac. 596; *Stark v. Gamble* (1862), 43 N. H. 465; *Hill v. Hill* (1911), 79 N. J. Eq. 521, 82 Atl. 338; *McEachern v. Stewart* (1894), 114 N. C. 370, 19 S. E. 702; *Eric School Dist. v. Griffith* (1902), 203 Pa. 123, 53 Atl. 34; *Mason v. Whitthorne* (1865), 2 Coldw. (Tenn.) 242; *In re Hodge's Estate* (1893), 66 Vt. 70, 28 Atl. 663, 44 Am. St. Rep. 820; *Davis v. Harmon* (1871), 62 Va. 194.



generally condemned, and something in the way of a penalty being sometimes imposed.

The principle of the non-mingling of trust funds is found specifically declared in many of the statutes authorizing the incorporation of trust companies. For example the Colorado statute<sup>5</sup> provides that: "The said company shall keep all trust funds and investments separate and apart from the assets of the company, and all investments made by said company as fiduciary shall be so designated that the trust to which such investments belong shall be clearly shown." There is a similar provision in the Iowa Trust Company law,<sup>6</sup> in Massachusetts,<sup>7</sup> in Pennsylvania,<sup>8</sup> in Vermont,<sup>9</sup> in West Virginia,<sup>10</sup> and in Wisconsin.<sup>11</sup> There are provisions in the trust company statutes of other states which strongly imply that there shall be no mingling of trust funds with the general assets of a company. As for example it is said by Louisiana law<sup>12</sup> that: "None of the funds or the property held by such a bank as agent or trustee shall be counted among the assets or liabilities of such bank in making the statements required by law to be published of the affairs of such bank." And in Maine<sup>13</sup> it is provided that: "All the property or money held in trust by such company shall constitute a special deposit, and the accounts thereof of said trust department shall be kept separate, and such funds and the investment or loans of them shall be specially appropriated to the security and

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5. Colo. Anno. Stat. 1912, Sec. 400.

6. Iowa Pub. Sess. Acts, 1913, Ch. 152, Sec. 3.

7. Mass. Laws, 1910, Ch. 411, Sec. 24.

8. Purdais Stats., p. 4832, Sec. 25.

9. Pub. Laws, 1910, Ch. 158, Sec. 77.

10. W. Va. Code, 1913, Sec. 3179.

11. Stats. 1911, Ch. 94, Sec. 2024, p. 77-M.

12. Rev. Laws La., 1904, p. 96, Sec. 8.

13. Me. Laws of 1907, Ch. 96, Sec. 14.



payment of such deposits and not be subject to any other liabilities of the company."

§ 33. Integrity of Trust Funds—Participating Mortgages. A participating mortgage is a mortgage taken by a trust company in its own name, as trustee and from time to time allotted in undivided portions to various trusts. "Whenever any such allotment is made the trust company makes fair and precise records and entries in its books, clearly demonstrating as to each mortgage the parts thereof which have been distributed to the various trusts concerned, and it faithfully conveys notice to the beneficiaries of the disposition of the fund."<sup>14</sup> The Surrogate upheld this kind of an investment, in the case cited, because he believed that disapproval would be contrary to the decisions by higher courts in New York and elsewhere. But he did not consider that the question was settled, nor that it could be settled "until it is settled right." He believed that such investments violate the law against the mingling of trust funds. Another objection in the instant case was that the mortgage was taken in the trust company's name individually. This, of course, could be easily remedied, by adding the description, "as trustee."

Removal of doubt as to the legality of this form of investment has been effected by statute in at least one state.<sup>15</sup> Similar legislation in other states has been advocated in "*Trust Companies Magazine*."<sup>16</sup> Wisconsin has provided that trust companies may transfer to trust estates without incurring other legal liability

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14. Matter of Union Trust Co. (1914), 86 N. Y. Misc. 392, 149 N. Y. Supp. 324. See review of unreported cases in "*Trust Companies Magazine*," July, 1914, pp. 7-12.

15. California.

16. "*Trust Companies Magazine*" for July, 1914, pp. 7-12.

than as if such transfer were made to a third person any mortgages or securities owned by it which are legal investments for trust funds.<sup>16½</sup>

§ 34. **Deposit of Trust Funds in Company's Own Banking Department or With Company's Own Deposits in Other Banks—Interest Rates.** The mingling of trust funds with the general funds on deposit with a trust company have presented new questions as to what rate of interest is chargeable against the trustee. In a Pennsylvania case,<sup>17</sup> it was held that where a trust company did not keep the money arising from the trust fund in its trust department, "but commingled the funds with the general deposits in the said institution, in the form of a general checking account, \* \* \* it should pay the same interest thereon that it would pay to a third party who carried with it a deposit of a like character; that is, an account subject to check." The New York courts have decided<sup>18</sup> that a trust company was chargeable with interest at the regular trust company rate of 3 per cent, and not with the legal rate of 6 per cent, where it deposited trust income in its ordinary bank accounts in other institutions and kept no separate account of the earnings. But the Court said: "This mingling of the trust income with the trustee's own money, consisted solely in depositing for collection the checks received for rent in one or more banks in which the trustee kept an ordinary deposit account in its own corporate name, and by checks on which accounts it made payments of the said trust income as well as pay-

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16½. Ch. 186 Laws of 1909, p. 882.

17. Reid v. Reid (1912), 237 Pa. St. 176, 85 Atl. 85.

18. Herzog v. Title Guarantee & Trust Co. (1911), 148 N. Y. App. Div. 234, 132 N. Y. Supp. 1114, modified in other respects, but approved as to above point in 210 N. Y. 531.

ments for its general purposes. In other words, the claimed use of the funds consisted solely in this, that the trustee allowed the estate the regular rate of interest, depositing its receipts as trustee in its ordinary bank accounts. But it affirmatively appears that such bank accounts continually showed a large balance of the title (trust) company and what is more important still, it is affirmatively established that that balance at all times exceeded the balance of the trust funds belonging to the McComb estate and that at no time was any draft made upon the account which required the use of any part of those funds to meet it. It, therefore, is clear that the judgment appealed from, cannot be sustained upon the theory that the trustee had made use of the trust funds, had failed to separate the profits therefrom from its ordinary profits and, therefore, should be charged with the full legal rate of interest.”

A very interesting case decided by a California District Court of Appeal<sup>19</sup> shows that where a fund is deposited with a trust company as a fiduciary, its use by the latter in its business does not take away from it the security afforded by special deposit required to be made.

There a will provided for a fund to be deposited in a trust company for certain minors and to be paid over to them “with the accumulated interest on arriving at the age of majority,” the deposit to be made in its savings department. The Court said: “The direction that it be deposited in the savings department is only significant as indicating that the trust company might use the money and pay the usual interest thereon. But this is allowed by the very terms of the act. \* \* \* The pay-

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19. *People v. California Safe Deposit & Trust Co.* (1913), 22 Cal. App. 69, 133 Pac. 324.

ment of interest directly by the corporation for the use of the money does not militate against the theory that the money was held in a trust capacity under the act. \* \* \* The trust company was thus appointed trustee to take and hold this money until the beneficiary should reach majority. It seems to be just such a trust as the act intended should be protected by the securities required to be deposited with the state treasurer."

The deposit of trust funds by a trust company in its own banking department was forcibly approved in a recent decision in New York.<sup>19½</sup> Here the Court said: "When we consider the nature of a trust company, the statutory authorization to act as a bank of deposit and as an executor, and the legal obligations protective of the fund, imposed by statute upon such an institution, it is unreasonable, unjust, and discordant with the statute law to require it to deposit in another banking institution, upon the assets of which it has no more security than any other creditor, the money received by it as a fiduciary, or to show that such deposit did not contribute in any degree to its profits as a banking institution."

**§ 35. Trust Company Statutes Respecting Investments Variant From Individual Trustee Rules.** I have adduced as authority cases so far as to the general rule of individual trustees mingling trust funds with their own property is concerned and deduced the conclusion, that, unless there is specific provision to the contrary, trust companies are bound in the same way. A Minnesota case<sup>20</sup> is quite instructive on this point.

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<sup>19½</sup>. *In re People's Trust Co. et al.* (1915), N. Y. App. Div. 155 N. Y. Supp. 639.

<sup>20</sup>. *St. Paul Trust Co. v. Strong* (1901), 85 Minn. 1, 88 N. W. 256.

The court after quoting from the trust company statute that: "The directors of any such corporation shall have discretionary power to invest all moneys received by it on deposit or in trust, in any such personal securities as are not hereinafter expressly prohibited; and it shall be held responsible to the owner or '*cestui que trust*' of such moneys for the validity, regularity, quality, *value* and genuineness of all such investments and securities *at the time* the said investments are so made and for the safe-keeping of the evidences and securities thereof," said: (Italics supplied.) "These are among the safeguards thrown about the business by the legislature, and, taking them together, it is argued that self-interest on the part of the trust company has been wholly removed; that nothing impedes the proper discharge of its duties with trust funds; that because it is responsible under the statute for the validity, regularity, quality, value and genuineness of notes and mortgages at the time the investments are made, it has been excepted from the general rule, and may transfer its own proper securities to any trust estate—in other words, deal with itself."<sup>21</sup>

The rule to which the Court referred was that: "A trustee cannot legally purchase on his own account that which his duty or trust requires him to sell on account of another, nor purchase on account of another that which he sells on his own account. He is not allowed to unite the two opposite characters of buyer and seller." After pointing out "the hazards which might surround and endanger trust funds" should this rule be not observed, it was said: "There was no intention to set aside well

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<sup>21</sup>. But see Matter of Long Island Loan & Trust Co., *supra*, under § 31.



settled rules for the conduct of private trustees, but, upon the other hand, it was the object and purpose to insure a rigid observance of such rules by statutory restrictions and regulations. The design of this legislation was to promote and insure strict business principles in the management of these companies, and thus to protect the people.”

But this statute as thus construed was shown merely to have its limitations in application and not as taking away “the discretionary power” expressly vested in the directors. This decision, however, is merely valuable for its reasoning, because now the Minnesota statute<sup>22</sup> confines investment of trust funds “in authorized securities,” there being the same responsibility as to their validity, regularity, quality, value and genuineness as before.

This statute, however, even in its amended form seems to place on trust companies a more stringent liability than exists against an individual trustee. It makes them guarantee “validity, regularity, quality, value and genuineness” of the securities in which a trust fund is invested.<sup>23</sup> The rule, I think, as to an individual trustee is, that he must act in good faith and that is all he is bound to, along with the exercise of the same care as in managing his own property, a sound discretion being required to be exercised, but he is not an insurer.<sup>24</sup> Thus it was ruled in a Missouri case,<sup>25</sup> reviewing a great

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22. Gen. Stats. 1913, Sec. 6412.

23. A similar provision is found in the Statutes of Indiana, Sec. 4953, Burns, 1908. *Indiana Trust Co. v. Griffith* (1911), 176 Ind. 643, 95 N. E. 573, 44 L. R. A. (N. S.) 873.

24. *Moore v. Eure* (1888), 101 N. C. 11, 7 S. E. 471, 9 Am. St. Rep. 17; *In re Roach* (1907), 50 Or. 179, 92 Pac. 118; *In re Chapman* (1896), 2 Ch. 763, 65 L. J. Ch. 892, 75 L. 7, N. S. 196.

25. *State v. Meagher* (1869), 44 Mo. 356, 100 Am. Dec. 298.

number of cases regarding the robbery of trust funds in the hands of an executor, and of his being, in equity, exonerated from accountability, and agreeing with them, that: "Besides, the holding of trustees to responsibility for trust funds in a plain case of theft or robbery, against which the watchfulness of a prudent man could not guard, would have a tendency to deter men of prudence and care from assuming such relations and responsibilities—thus leaving these funds to fall into the hands of less careful and scrupulous persons and to a consequently increased hazard." It is hard to imagine reasoning of this kind were a statutory trust company seeking exoneration.

I imagine, but I can find no case directly in point, that, if an individual trustee were to invest trust funds in bonds that were forgeries and he took all reasonable precautions to ascertain their genuineness, he would be exonerated. I know he has been exonerated, in some cases for investment in Confederate bonds,<sup>26</sup> while in others he was held upon the ground that such an investment contributed to the financial resources of the Confederate government and was in aid of its cause.<sup>27</sup> But even this principle was held not to forbid a reinvestment of Confederate currency by the purchase of Confederate bonds.<sup>28</sup> In *Lamar v. Micou*,<sup>27</sup> the Court said Confederate notes and bonds "had no legal value as money or property" they could "never be regarded \* \* \* as securities in which trust funds might be lawfully in-

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26. *Cobb v. Taylor* (1869), 64 N. C. 193; *Waller v. Catlett* (1887), 83 Va. 200, 2 S. E. 280.

27. *Horn v. Lockhart* (1873), 17 Wall 570, 2 L. Ed. 657; *Lamar v. Micou* (1884), 112 U. S. 452, 28 L. Ed. 751.

28. *Baldy v. Hunter* (1898), 171 U. S. 388, 43 L. Ed. 208.



vested." I have no doubt that a trust company investing in any kind of spurious bond or security would be held liable for real validity, however honestly deceived it were. I greatly doubt whether an individual trustee always would be held. The courts in the cases refusing to exonerate the trustee held as they did, not because the bonds were of a spurious government, but of a government in rebellion to the United States government.

In Massachusetts there seems to be a difference in the rule as to investment by an individual trustee and that by a trust company in a fiduciary capacity. Thus, if a guardian sells property "in order to place on interest or invest the proceeds, he shall make the investment according to his best judgment, or in pursuance of any order of the court relative thereto."<sup>29</sup> But if a trust company is such guardian it may make investments "in authorized loans of the United States or any of New England states, counties, cities or towns."<sup>30</sup> And in Michigan the trustee of an estate appointed by the probate court to invest or distribute it must do so as ordered by the court.<sup>31</sup> But if a trust company is appointed, it may invest trust funds "in bonds secured by mortgages, or notes and mortgages on unincumbered real estate within the State of Michigan \* \* \* or in public stocks and bonds of the United States, or any state of the United States that has not defaulted on its principal or interest within ten years: or of any organized county or township or incorporated city or village, or school district in this state, or in any other such state, duly author-

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29. Mass. R. S. Stats. 1902, p. 1319, Sec. 22.

30. Mass. R. S. Stats. 1902, p. 1115, Sec. 36.

31. Howell's Annos. Stat. 1913, Sec. 12142.

ized to be issued, or in such real or personal securities," they (the directors) may deem proper."<sup>32</sup>

Under a New York trust company act, it would be difficult to arrive at the conclusion that a trust company acting in a fiduciary capacity would be exonerated for its mistake in investing in invalid securities. The statute says: "All investments of money \* \* \* in either of such (fiduciary) characters shall be at its sole risk and for all losses of such money, the capital stock, property, and effects of the corporation shall be absolutely liable, unless the investments are such as the courts recognize as proper when made by an individual acting as trustee, executor, administrator, guardian, receiver, committee, or depositary, or such as are permitted in and by the instrument or words creating or defining the trust."<sup>33</sup> The statute then goes on to give to fiduciary obligations a preference over other debts in event of dissolution of the trust company.

Another section of this act authorizes investment by a trust company of fiduciary funds in the discretion of the company in the securities of the kind in which its capital is required to be invested, or in the stocks or bonds of any state of the United State, or in such real or personal securities as it may deem proper.<sup>34</sup> Its capital is required to be invested "in bonds and mortgages on unincumbered real property in this state not exceeding sixty per centum of the value thereof, or in the stocks or bonds of this state, or of the United States, or of any county or incorporated city of this state duly authorized by law to be issued." Therefore there is given to a trust company a wide latitude in the invest-

32. Ibid. Sec. 6486.

33. N. Y. Anno. Consol. Laws 1909, Ch. 10, Sec. 190.

34. Ibid. Sec. 193.

ment of fiduciary funds, but their investment has back of it a preference over all other obligations of the trust company.

As to investments by an individual trustee, New York statute provides that he "may invest \* \* \* in the same kind of securities as those in which Savings Banks of this state are by law authorized to invest the money deposited therein and the income derived therefrom and in bonds and mortgages on unincumbered real property in this state worth fifty per centum more than the amount loaned thereon."<sup>35</sup> Investments by Savings Banks of funds deposited with them include (1) obligations of the United States; (2) obligations of New York; (3) obligations of any other state not having defaulted in ten years; (4) stocks or bonds of any city, county, town, village, school district of New York; (5) stock or bonds of any incorporated city in any other state admitted into the union prior to 1896 under certain conditions; (6) bonds and mortgages on unincumbered real property up to 60 per cent if improved and 40 per cent if unimproved; (7) mortgage bonds of certain railroad companies.<sup>36</sup> Here it is perceived there is a wide discretion given to individual trustees. Indeed it would appear to be somewhat wider than to trust companies acting as trustees. There is, however, a difference in what one may invest in and what the other may not invest in.

A New York Court of Appeals opinion (*Villard et al. v. Villard*, Dec. 28, 1916), holds a trust company liable as a successor trustee for continuing unauthorized investments and speaks of such a company's special

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35. *Ibid.* p. 4187.

36. *Ibid.* p. 407, Sec. 146.

knowledge of investments being a reason for the executors of the estate not owing a special duty to inform it of the investments made by them as distinguished from those made by the testator.

**§36. Liability of a Trust Company for Trust Funds.** Herein, I think, consists the prime reason for the preference of a trust company as a fiduciary over that of an individual. According to the general rule, an individual, who is a trustee is personally liable to his *cestui que trust* for any loss or default in regard to the trust property, but there is no lien or preference given for its payment or security out of the general property of the trustee. It is true he may follow trust property, either in its original or converted form, if he can trace it, but this rule has many limitations, and apart from it the trustee stands as an ordinary debtor.

In all trust company statutes, however, the trust fund creditor is peculiarly favored. Thus in the New York statute and in others of its type he is given a general preference over all other of the creditors of a trust company. When it is considered that the general solvency of trust companies in their banking and other business is aided in strict regulation by state officers, one would have to imagine a most disastrous cataclysm in their affairs that would take away the security from their first preference debts.

Then take a trust company under such a law as in Missouri, it being of the same character as others, and it is seen that every trust company must maintain as a deposit with the proper officer of the state a fund in specified securities and: "The fund so deposited \* \* \* shall be primarily liable for the obligations of such company as guardian, curator, executor, administrator, assignee, receiver, trustee by appointment of court or

under will, depositary of money in court, guarantor or surety in or upon any bond required to be given under the laws of this state, or other fiduciary capacity under appointment of any court, and, as well, all bonds, contracts or guarantees of every kind or description, whereby the fidelity of persons holding places of public or private trust is insured or guaranteed.”<sup>37</sup> This fund is seen not to be solely, but “primarily” liable for such obligations, and in addition there is the same right of a trust fund creditor against the trust company and its other assets as a *cestui que trust* has generally against the estate of an individual trustee, that is to say, he shares *pro rata* with others.<sup>38</sup> This question is well treated in a New Hampshire case<sup>39</sup> where a trust company’s assets were being distributed in insolvency. There were three classes of creditors (1) depositors in the savings department, (2) holders of debenture bonds, and (3) unsecured creditors. It was ruled that the first two classes were entitled to share with the unsecured creditors in the distribution of the unpledged assets, as to so much of their claims as were not satisfied by the application of the special funds created for their benefit. The court, in reasoning, said: “All corporations which engage in the banking business have a paid up capital. One purpose of this capital is to create a fund available to pay the claims of all those who have dealings with such companies. \* \* \* According to the view of the general creditors, their claims must be paid in full out of this fund before any of it is available to pay the claims of depositors in the savings department of such an

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37. R. S. Mo. 1909, Sec. 1140.

38. Goff v. Goff (1903), 54 W. Va. 364, 46 S. E. 177.

39. Bank Commrs. v. Security Trust Co. (1908), 75 N. H. 107, 71 Atl. 377.



institution. "But," said the court, "the profits of the savings department of such an institution go into and become a part of the general assets just as much as the profits of the general banking business. Consequently, since 'natural justice' requires that those who help create a fund and those for whose benefit it is created should share in its distribution, the legislature must have intended that the depositors in the savings department of a trust company should share in the distribution of the general assets, in the same way and to the same extent as the company's other creditors." I think it is impossible not to see that this reasoning applies to funds in the fiduciary department of a trust company.

It is debatable whether the New York law, or those of its type generally, would assure more certainty in the full payment of fiduciary obligations than do statutes like that of Missouri.

It is true that back of the individual trustee is his bond, and generally speaking the trust company trustee does not give a bond. In a conventional trust where no bond is required for a trustee qualifying, or where an executor is named, the rule of safety would seem too clear to admit of dispute. But even in case of a bond it would seem that a personal debt with a merely personal obligation back of it, neither carrying any lien for its security, ought not to be deemed as safe as a primary demand upon a corporation's general assets under regulation of law or a primary demand upon a special fund maintained by law.

It is to be observed that Missouri law creates the same primary demand on bonds that a trust company signs as surety, and in such case it would be difficult to say that a trustee going on such a bond, a trust fund

would be any less safe than were the company itself the trustee. It might be that where statutes permit the trustee to charge the cost of such a bond to the estate this might be deemed an unnecessary expense.

§ 37. **Following of Trust Property and Its Proceeds.** It is familiar law, that trust property, however changed in form will, whenever it can be traced and identified, be subjected to the trust,<sup>40</sup> and the *cestuis que trust* may have the benefit of all accretions in the hands of any person with notice of its character.<sup>41</sup> The application of this principle extends over beyond the trustee's death so as to make his estate liable.<sup>42</sup> A *cestui* is not bound to pursue this remedy, but he has an election to do so or enforce against a trustee a personal liability,<sup>43</sup> and there arises against the *cestuis* the rule of estoppel where he exercises his option.<sup>44</sup>

This trust fund doctrine, where the trustee is an individual, looked so strictly to the trustee as the owner, that at common law if there were several trustees they were deemed to hold as joint tenants and upon the death of one the title passed to his survivor.<sup>45</sup> When the sur-

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40. *Central Nat'l Bank v. Conn. Life Ins. Co.* (1881), 104 U. S. 54, 26 L. ed. 693; *Holmes v. Gilman* (1893), 138 N. Y. 369, 34 N. E. 205, 34 Am. St. Rep. 463, 20 L. R. A. 566.

41. *Hopkins v. Burr* (1898), 24 Colo. 502, 52 Pac. 670, 65 Am. St. Rep. 238; *Mathewson v. Wakelee* (1910), 83 Conn. 75, 75 Atl. 93; *Pundmann v. Schoeneich* (1898), 144 Mo. 149, 45 S. W. 1112; *Lincoln v. Morrison* (1902), 64 Neb. 822, 90 N. W. 905.

42. *State v. Bruce* (1909), 17 Ida. 1, 102 Pac. 831, 134 Am. St. Rep. 245.

43. *McKee v. Downing* (1909), 224 Mo. 115, 124 S. W. 7; *Stephens v. Stephens' Adm'r* (1889), 89 Ky. 125, 12 S. W. 192; *Marquette v. Wilkinson* (1899), 119 Mich. 419, 78 N. W. 474, 43 L. R. A. 840.

44. *Riehl v. Evansville Foundry Ass'n.* (1885), 104 Ind. 70, 3 N. E. 633; *Carter v. Gibson* (1901), 61 Neb. 207, 85 N. W. 45, 52 L. R. A. 468.

45. *Reichert v. Missouri, etc., Coal Co.* (1907), 231 Ill. 238, 83 N. E. 166, 121 Am. St. Rep. 307; *F. G. Oxdey Stove Co. v. Butter County* (1894), 121 Mo. 614, 26 S. W. 367; *Mattison v. Mattison* (1909), 53 Ore. 254, 100 Pac. 4, 133 Am. St. Rep. 829, 18 Anno. Cas. 218.



vivor died, and *semble* where there was no joint tenancy, the title passed by operation of law to his heir at common law, if the trust was of real estate,<sup>46</sup> and to his personal representative if the trust was of personality.<sup>47</sup> Statutes, however, have abolished this rule, and where a trustee dies a new trustee is appointed by the court.<sup>48</sup> These statutes, of course, have no effect on the principle of the right to follow a trust fund or property, or as giving an election to hold a former trustee's estate liable, except that they may give to his successor a right of action in the interest of the *cestuis que* trust. The rule I have been discussing appears to apply as well to the holder of trust property who gives bond for the faithful performance of his duties as to one who fails to give such bond and to conventional and statutory trustees.<sup>49</sup>

**§ 38. Right to Follow Trust Funds Turned Over by a Statutory Trust Company.** The inquiry proposed here does not concern trust property coming into the hands of a trust company in any other way than as trustee. The general rule as to the tracing and identifying of property as trust property in a third person's hands would, of course, apply to property received from a trustee by a statutory trust company just as to any other recipient thereof. What I wish to ascertain is whether, though you may follow trust property after it gets out of the hands of an individual as trustee, you may do the same thing when such property gets out of

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46. *Cameron v. Hicks* (1906), 141 N. C. 21, 53 N. E. 728, 7 L. R. A. (N. S.) 407; *Woodruff v. Woodruff* (1888), 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380.

47. *Gulick v. Bruere* (1887), 42 N. J. Eq. 639, 9 Atl. 719.

48. *Speer v. Colbert* (1906), 200 U. S. 130, 50 L. ed. 403.

49. *Tonges v. Vanderveer Canarsie Improvement Syndicate* (1914), 148 N. Y. Supp. 748.

the hands of a statutory trust company holding the same as a trustee.

One argument that may be made against the right to do this lies in the fact that the statute under which a trust company holds as trustee gives to the *cestuis que* trust or the beneficiary of the fund either a preference right over its other creditors, as the New York statute prescribes, or securities are deposited for the primary benefit of its fiduciary liabilities, as the state of Missouri and some other states require. Do such provisions by implication indicate an exclusive remedy as to trust property?

It might be argued that so far as mere funds, money and the like, are concerned, the scheme in organization of trust companies contemplates that they are to use these in the course of their business and nothing more than a preference liability arises under general law, especially as this would be the result in the case of an individual trustee, money having no ear marks whereby it can be followed and the trustee being bound to reasonable diligence to make the fund produce an income. But when a trust consists of securities negotiable by indorsement, but yet directed to be kept intact and not sold for reinvestment, the question becomes somewhat narrower. These securities, like money, pass from hand to hand, except that one having actual notice of limitations in the power of the trustee would take them subject to such notice.

Admitting, then, that the individual trustee could not pass good title to such a taker and the *cestui* could follow them, could he do the same thing where a trust company transfers them? And if he elected to follow the securities, would he waive his right as a preference

creditor or to be reimbursed wholly or upon a *pro rata* payment, out of the securities primarily liable for fiduciary obligations?

Take again, for example, the case of a trustee having title to property the income from which is to be applied for a certain time and then the trust to cease, with remainder to go to others as a legal estate, the trustee in the meantime and upon the performance of certain conditions having the right to sell for reinvestment. If an individual trustee violated his trust the *ccestuis* could follow the property into the hands of a purchaser with notice. Could he, however, do the same, where a statutory company is trustee and there being such statutory provisions for his benefit as I have indicated?

These inquiries or suggestions are considered important in view of the mingling of banking business, transfer agency business, and, in some states, fidelity bond business (this last also being a preference claim out of deposited securities, as under Missouri statute) and the long time trusts often created. The preferences as by New York law, or the deposit of securities as by other law, sometimes might prove insufficient to meet trust obligations in full. These provisions, however, emphasize the policy of the law as to trust property, while at the same time they appear not to regard its nature beyond the limit of such provisions. I realize that there ought to be, in the absence of express statutory exclusion, a very strong implication to prevent the application of long settled equitable principles, merely because there is a new kind of trustee, as to the assets of which there are preferences given in favor of trust creditors. A Pennsylvania case<sup>50</sup> speaks of a deposit made with a

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50. *Graff v. City Savings Fund & Trust Co.* (1911), 46 Pa. Super Ct. 423.

trust company to save it harmless as surety of the depositor. The trust company mingled this with its general funds in its deposits with a bank. It was held the depositor was merely a general creditor, because he was unable to identify the fund.<sup>51</sup> And this rule was also held to apply, where a trustee or fiduciary other than the trust company, which was also the surety of the fiduciary, made a deposit with the trust company, and it was mingled with its general funds.<sup>52</sup> Had the Pennsylvania statute been framed as is the Missouri statute there would have been another question, that is to say, had the special fund been as well for the protection of those for whom the trust company was surety as for deposits with it in a fiduciary capacity.

In none of these cases was the point presented of following trust funds out of the hands of a trust company. The principle is one in election of remedy. If a *cestui que trust* sues for the conversion of the fund, he waives his suit for the fund itself and *vice versa*. If a special fund were not set apart, or a preference claim were given out of the general property of a trustee, the *cestui que trust* would not have any election of remedies, but would he not become bound from the very inception of the appointment of the trustee to abide by the preference the law gives to the nature of his demand?

The inference is not conclusive, but it appears to me that it ought to have some weight on the question whether a creditor of a trust company in its purely fiduciary capacity may follow trust funds into other hands, namely, that added to its general responsibility and its special responsibility, there is super-added the

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51. *Com. ex rel. v. Union Surety & Guaranty Co.* (1908), 37 Pa. Super Ct. 179.

52. *Estate Solicitors' Loan & Trust Co.* (1897), 3 Pa. Super. Ct. 244.

frequent requirement that stockholders thereof are bound by a double liability as to all of its debts.

Thus I find decisions recognizing and enforcing this double liability in Maryland,<sup>53</sup> in Maine,<sup>54</sup> in Massachusetts,<sup>55</sup> in Pennsylvania,<sup>56</sup> and in New York,<sup>57</sup> and no doubt many other cases could be cited. Not all of the cases above cited adjudged enforcement, but they show as the statutes do the existence of this kind of liability.

At all events, whether a *cestui que trust's* property is converted by a trust company or not, surrounded as it is with so many safeguards, rarely, if ever, would a case occur where there would be any desire to pursue the fund in other hands, especially if by so doing there would be involved any question of election, whereby one form of action being resorted to, there might arise estoppel against resorting to another.

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53. *Miners' & Merchants' Bank v. Snyder* (1904), 100 Md. 57, 59 Atl. 707, 68 L. R. A. 312, 108 Am. St. Rep. 390, 68 L. R. A. 312. As to the time when such liability begins, see *Murphy v. Wheatley* (1905), 102 Md. 501, 63 Atl. 62.

54. *Maine Trust & Bkg. Co. v. So. Loan & Trust Co.* (1899), 92 Me. 444, 43 Atl. 24; *Johnson v. Libby* (1913) (Me.), 88 Atl. 647.

55. *Nichols v. Taunton Safe Deposit & Trust Co.* (1909), 203 Mass. 551, 89 N. E. 1035; *Coyle v. Taunton Safe Deposit Co.* (1911), 207 Mass. 441, 93 N. E. 791.

56. *DeHaven v. Pratt* (1909), 223 Pa. 633, 72 Atl. 1068.

57. *Cheney v. Scharman* (1911), 145 N. Y. App. Div. 456, 129 N. Y. Supp. 993; *Gause v. Boldt* (1907), 188 N. Y. 546, 80 N. E. 566; *Mosler Safe Co. v. Guardian Trust Co.* (1913), 208 N. Y. 524.

## CHAPTER VIII

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### Trust Companies as Co-Fiduciaries and as Agents for Individual Fiduciaries

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§ 39. **In General.** The joining of a trust company as co-trustee, co-executor, or as agent for personal fiduciaries has afforded a happy solution to the problem of management, when trust company experience, responsibility and equipment are desired, together with the direction and judgment of individual relatives, friends or persons having a peculiarly personal knowledge of the family's affairs or long connected with a particular enterprise or business.<sup>1</sup> The authority of trust companies to act in such capacities cannot be doubted.<sup>2</sup> The difficulty once existing in England to the effect that corporations could not act as joint tenants was obviated by an Act of Parliament,<sup>1½</sup> and does not appear to have been raised in America.

A trust company may be appointed one of several trustees, under a power authorizing the appointment "of a new trustee or new trustees."<sup>2</sup>

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1. A provision in a will appointing a trust as executor and designating an individual to act with it was construed to intend that both act as joint executors. *Varble v. Collins' Ex'r* (1916), Ky. 181 S. W. 1115.

1½. Joint Tenancy Act, 1899 (62 & 63 Vict. c. 20; Underhill's Law of Trust & Trustees (7th Ed. 1912), p. 395.

2. *Re Thompson's Settlement Trusts*, *Thompson v. Alexander* (1905), 1 Ch. 229, cited in Underhill's Law of Trusts & Trustees (7th Ed. 1913), p. 395.



It has been suggested that where a company is a co-trustee, and a new individual trustee is to be designated to fill a vacancy, it would be improper to appoint an official of the trust company, as this would destroy the independence of the joint trustees<sup>3</sup>—one of the possible considerations in the establishment of the joint trust. It is submitted, however, that there would be no such objection to an original appointment of the company and an officer by the creator of the trust, for then the idea of independence would be impliedly excluded.

The trust company usually performs all the ministerial duties of a joint trust. In so doing it may be the agent of its co-fiduciaries, a function which the law permits. Thus, in a New York case,<sup>4</sup> the Court said:

“It is unquestionable that in the performance of their duties as trustees they had a right to appoint an agent to do some portion of their work, and it is equally undoubted that in appointing an agent they were not precluded from appointing one of their own number. On the contrary, it would seem as if every argument which might be urged in favor of the right to appoint an agent generally, would apply with greater force to the appointment of one of their own number.”

By reason of its facilities the trust company has the better right to take the custody of the deeds and securities belonging to an estate. The law authorizes co-fiduciaries to commit such care to one of their number.<sup>5</sup>

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3. Allen on “The Law of Corporate Executors and Trustees” (British), citing Lewin (Ed. 1905), p. 808.

4. *Purdy v. Lynch* (1895), 145 N. Y. 462, 472. Any one of several trustees may receive rents, though all must concur in a conveyance. Lewin on Trusts (12th Ed.) 292; same rule as to dividends on stock, p. 291.

5. *Cottam v. Eastern Counties Rail Co.*, 1 John & H. 243; Lewin on Trusts (1905), pp. 325, 855.

**§ 40. Liability of Joint Trustees.** Co-trustees are but one collective trustee, in contemplation of law, and must exercise the duties of their office in their joint capacity. As the law requires them to join in conveyances, receipts and discharges, it is held that the fact that they do so join is not conclusive evidence of their joint liability. "Such joinder may be explained and each trustee will be held liable individually no further than assets which have come into his hands, provided the transaction is a fair one and there is no breach of trust."<sup>6</sup>

An English text writer<sup>7</sup> states that there are three ways in which a trustee may become liable for the default of his co-trustee, and that these are as follows:

"I. Where the trustee receives trust money and hands it over to a co-trustee without securing its due application.

"II. Where he permits a co-trustee to receive trust money without making due inquiry as to his dealing with it.

"III. Where he becomes aware of a breach of trust, either committed or meditated, and abstains from taking the necessary steps to obtain restitution, or to prevent it from being accomplished."

The instrument creating the trust may negative the operation of the above rules, to some extent, at least, by the insertion of indemnity clauses.<sup>8</sup>

**§ 41. Liability of Joint Executors and Administrators.** It is said that the same rules that apply to the powers and liabilities of co-executors apply to the

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6. 28 Am. & Eng. Encl. of Law 1071.

7. Godefroi's Law of Trusts (2nd Ed. 1891) 243.

8. See Chapter X of this book.

powers and liabilities of co-administrators.<sup>9</sup> But, owing to the fact that co-executors and co-administrators, unlike co-trustees, have a several power over the estate, they are liable upon joint receipts under circumstances that would not render co-trustees responsible.

"An executor has, independently of his co-executor, a full and absolute control over the personal assets of the testator. If an executor join with a co-executor in a receipt, he does a wanton and unnecessary act, he interferes when the nature of the office lays upon him no such obligation, and, therefore, it was a rule very early established, that if executors joined in receipts they should be answerable each *in solido* for the amount of the money received."<sup>10</sup> But this strict rule has been varied and relaxed in later cases.<sup>10</sup>

**§ 42. Liability as Agent for Individual Fiduciaries.** When a trust company acts as agent for an executor, administrator or a trustee, it assumes no direct liability to the beneficiaries, as it is accountable only to its principal, unless it knows that a breach of trust is being committed by its principal.<sup>11</sup>

An agent for co-trustees should see that its authority is derived from both trustees and that payments are made to both of them.<sup>12</sup>

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9. Perry on Trusts & Trustees, Sec. 425; Lewin on Trusts (12th Ed.) 304.

10. Lewin on Trusts (12th Ed.) 297.

11. Perry on Trusts & Trustees, Sec. 813, citing Brinsden v. Williams (1894), 3 Ch. 185, where solicitors who acted as agents in paying over trust money upon an investment arranged by the trustee without knowledge that the investment was unauthorized, were held not liable, and Blyth v. Fladgate (1891), 1 Ch. 337, where agents were held liable for paying over trust funds on an investment which they had notice was unauthorized. See, also, 29 Cyc. 306.

12. Leyton v. Sneyd, 2 Moore C. P. 583, 8 Tant. 532, 4 E. C. L. 263; Lee v. Sankey, L. R. 15 Eq. 204, 27 L. T. Rep. N. S. 809, 21 Wkly. Rep. 286.

## CHAPTER IX

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### Trust Companies as Trustees for Charities

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§ 43. **In General.** "A 'charity' in the legal sense, may be defined as a gift to be applied consistently with existing law, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, or by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life or otherwise lessening the burdens of government."<sup>1</sup>

Corporations have long been recognized as the best means for the administration of these trusts, largely because of their perpetual existence.<sup>2</sup> It is ruled that any corporation may hold estates for charitable purposes "in accord with or tending to promote the purposes of its creation, although such as it might not, by its charter or by general laws, have authority itself to establish or to spend its corporate funds for."<sup>3</sup> This is the situation of a trust company acting as trustee for charities. It is bound to conduct its own business for

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1. *Jackson v. Phillips* (1867), 14 Allen 556; *Carter v. Whitcomb* (1908), 74 N. H. 482, 69 Atl. 779, 17 L. R. A. (N. S.) 733.

2. *Taylor v. Bryn Mawr College* (1881), 34 N. J. Eq. 101, citing *Whiteford's Law of Char.* 2; *Tudor's Law of Char. Trusts*. See "The Story of Trust Companies" by Perine.

3. *Jones v. Habersham* (1882), 107 U. S. 174, 27 L. Ed. 401.

profit, for thereby is its solvency maintained and adequate security afforded to its *cestui que trustent*. It cannot, therefore, expend its own funds on charitable objects, but in accordance with its charter right to act as trustee for others, it may accept the management and distribution of funds devoted to charitable purposes. The trust company's perpetual existence, its equipment and expert service, commend its employment in such a relation. Its unique position in this regard has evolved a new field for its activities, namely, "the community" trust, discussed in the following section.

#### § 44. Origin and Plan of the "Foundation" or "Community Trust."

To Mr. F. H. Goff of Cleveland, Ohio, is the credit given for originating a public service theretofore unperformed. At his instance the directors of the Cleveland Trust Company on January 2, 1914, adopted a resolution creating "The Cleveland Foundation, a Community Trust." A copy of this resolution is contained in the appendix of this book. At the date of this writing the plan has been literally followed in a number of cities.<sup>4</sup> The Boston Safe Deposit and Trust Company has adopted the idea, with changes in general form and wording, in its "Permanent Charity Fund," established September 7, 1915, a copy of which is contained in the Appendix.

The purposes of the community trust are thus stated by Mr. Goff:

"To receive and to safeguard donations in trust under supervisions and regulations imposed by state legislation; to employ the principal or income, or both, for educational and charitable purposes in a broader and

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4. See Trust Companies Magazine (Nov., 1915), Vol. XXI, p. 429.

more useful manner in future years than it is now possible to anticipate; to provide for specific needs stipulated by the donor; to insure the perpetuity of principal when that is desired; to lessen preventable errors of judgment in the disposal of principal and income; to guard against unwise use of income and principal by beneficiaries; and by a union of available funds to promote the civic, moral and mental welfare of the people in the widest, wisest, most economical and most efficient manner.”

The most distinguishing feature of this trust is the wide discretion as to objects, enabling the trustee to meet the new conditions which no benefactor can foresee. Many charities have been rendered useless because no one had the power to change their purposes. A notable example of this is cited in the pamphlet describing the St. Louis Community Trust, namely, the Mullanphy Emigrant Fund. This was created “to furnish relief to all poor emigrants and travellers coming to St. Louis on their way, bona fide, to settle in the West.”<sup>5</sup> The fund is now a very large one, but the number of applicants for its assistance are small. Travelling to the West is not the difficult and expensive task that it was in the frontier days and present immigration laws keep paupers out of this country.

The “Community Trust,” by its elastic provisions, would meet this situation, and in a way to make each dollar effective for “the greatest good.” In the words of the pamphlet describing the Spokane Foundation, it would keep a gift or bequest “alive to the needs of the hour and change its uses and distribute its benefits wisely

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5. Sec. 986 Dillon's Municipal Corporations.



and broadly in the light of advancing civilization and the deserving demands of the time."

§ 45. **The Legality of "Community Trusts."**—This form of trust is apparently framed with careful regard to the limitations upon charitable bequests which the varied attacks of disappointed relatives have placed upon them. These limitations, in general, need not be noticed in this work, but the distinguishing feature of these trusts, namely, the provision for varied, broad and changing objects, deserves more particular attention. This has not as yet been directly tested with respect to the so-called "community trusts," but the principles involved have been very fully considered. Thus, where a trust company was appointed trustee of a fund, the interest of which was to be paid to a specified society, which in turn was to apply it "in distributing the Bible or Word of God to the destitute of the earth," it was held that the object was sufficiently definite to establish the validity of the trust.<sup>6</sup> The trust company, in this case, had no power to select either the immediate or ultimate beneficiaries. The immediate beneficiary, i. e., the society, was named. The indefiniteness pertained to selection of the ultimate beneficiaries, namely, the "destitute of the earth." The power to select the individuals among this vast class was vested in the society. The Court said that charitable trusts "are sufficiently certain and determinate if the class of the beneficiaries be named in general outline, leaving to the trustee (the society) the discretion to select the immediate objects of the class named to be the actual beneficiaries of the bounty of the settlor of the trust." They relied upon a prior decision in which several general charitable ob-

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6. *Kasey v. Fidelity Trust Co.* (1909), 131 Ky. 609, 115 S. W. 739.

jects were stated and discretion as to proportion and manner of payment among them was vested in the trustees.<sup>7</sup> No distinction was made between indefiniteness in the power to choose between several charities and indefiniteness in the power to select the beneficiaries of a particular charity. It is difficult to see how any such distinction can logically be made. If this conclusion is correct, then the many well considered cases holding that charitable trusts are valid, though the beneficiaries are indefinitely described, are authority for the legality of the so-called "foundation" or "community trusts," in respect to the wide latitude given for the selection of different kinds of charity. The cases on this subject are extendedly considered in a note to Perry on Trusts.<sup>8</sup>

The decision in the famous case of *Tilden v. Green*,<sup>9</sup> where it was held that a devise in trust to be applied to such charitable, educational and scientific purposes as, in the judgment of the trustees, will render it most widely and substantially beneficial to mankind, was void for indefiniteness and uncertainty, has led to an enactment in New York which provides that no charitable gift shall be deemed invalid by reason of indefiniteness or uncertainty of beneficiaries.<sup>10</sup>

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7. *Leak's Heirs v. Leak's Ex'r* (1904), 25 Ky. Law Rep. 1703, 78 S. W. 471.

8. Note (a) Sec. 729.

9. (1891) 130 N. Y. 29, 28 N. E. 880, 14 L. R. A. 33, 27 Am. St. Rep. 487.

10. New York Charitable Uses Act, Law (1893), c. 701; *Utica Trust & Deposit Co. v. Thomson* (1914), 87 N. Y. Misc. 41, 149 N. Y. 396.

## CHAPTER X

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### Stipulations for Protection of Trust Company— Indemnity Clauses

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§ 46. **In General.** Often the duty to be performed in a fiduciary capacity is attended by risks which a trust company cannot safely assume without stipulations for its protection, or so-called "indemnity clauses." The power to insert and rely upon such clauses rests upon the broad right to contract as one pleases, so long as established rules of public policy are not violated. Thus parties cannot contract for immunity from fraud, gross negligence, or their own wilful wrongs, nor can they contract away the right of an aggrieved party to apply to the courts for relief.<sup>1</sup>

§ 47. **Examples and Construction of Indemnity Clauses—Co-Trustees.** The effect of clauses exempting a mortgage trustee from liability, "except for its own wilful and intentional breach," is considered in a part of this book entitled "Mortgage Trustee Clauses Annotated."<sup>2</sup> This, of course, is but a particular application of the broad power to abridge the ordinary duties of trustees. The effect of such abridgment with re-

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1. Hughes on Contracts, Secs. 3, 16, 18.

2. Appendix, page 460.

spect to the liability of co-trustees is well illustrated by an English decision.<sup>3</sup> Here a clause in a will provided—"that any trustee who shall pay over to his co-trustee, or shall do or concur in any act enabling his co-trustee to receive any moneys, shall not be obliged to see to the application thereof; nor shall such trustee be subsequently rendered responsible by an express notice or intimation of the actual misapplication of the same moneys." It was held that, where two trustees under this power enabled a third to receive moneys, who misapplied them, and the fraud was concealed for two years, the two were not liable, "though but for the special power they would have been declared liable on the ground of *crassa negligentia*."<sup>4</sup> It has been said, however, that in "the majority of cases the attempt of the trustees to evade responsibility by virtue of indemnity clauses has been made without success."<sup>5</sup> This conclusion was drawn from a review of English and Canadian cases, digested in the note.<sup>6</sup>

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3. *Wilkins v. Hogg*, 3 Giff. 116, 10 W. R. 47, followed in *Pass v. Dundas*, 43 L. T. N. S. 665, 29 W. R. 332.

4. *Lewin on Trusts* (12th Ed.), page 305.

5. 9 Canadian Law Times (1889) 1.

6. *McCarter v. McCarter*, 7 O. R. 243, holding inactive executors liable for not making inquiry as to disposition of funds, though the will provided that each of the executors should be responsible for his or her acts only, and irresponsible for any loss unless through wilful neglect or default. *Robdard v. Cooke*, 36 L. T. N. S. 504, 25 W. R. 555, holding that a clause in a will providing that trustees should be responsible only for such moneys as they should actually receive, did not relieve a co-trustee from liability for giving defaulting trustee power to draw from a bank account. *Hale v. Adams*, 21 W. R. 400, holding co-trustee liable, notwithstanding indemnity clause, for losses from speculation by the other trustee, because he had taken no steps to secure the proper disposition of the funds. *Budge v. Gummow*, L. R. 7, Ch. 719, holding trustees liable for loss by investment on insufficient security, caused by neglect in not obtaining proper valuations, though indemnity clause provided that the trustees should not be liable for involuntary losses. *Rehden v. Wesley*, 29 Beav. 213, holding that indemnity clauses must be strictly construed, and that where a deposit is really an investment it will not

In a New York case<sup>7</sup> a will contained the provision: "And I exempt every trustee of my will from liability for losses occurring without his own wilful default." One of the two co-trustees defaulted for a large amount of the trust funds. As to the part of the default, of which he had no knowledge, the innocent trustee was not liable, but as to the amount of which he was informed, he was liable because after learning of such default, he permitted the defaulter to continue in the performance of active trust duties. With reference to the indemnity clause, the Court said: "The words 'wilful default' imply more than negligence or carelessness; the word 'wilful' means intentional, while the word 'default' means transgression; thus it was evidently the intention of the testator to relieve each trustee from everything but his individual intentional transgression." The Court regarded the action of the co-trustee, after he had direct notice that the other was a defaulter, in permitting him to collect rent and interest as "a wilful

6. (Continued from preceding page)—

come within an indemnity clause, providing that trustees shall not be liable for loss of trust money deposited with any banker for safe custody. *Brumridge v. Brumridge*, 27 Beav. 5, holding that an indemnity clause does not exonerate a trustee from the consequences of misapplication of funds by a co-trustee. *Dix v. Burford*, 19 Beav. 409, holding an executor liable for misapplication by a co-executor, notwithstanding an indemnity clause providing that the executors should not be chargeable except for their respective receipts, etc. *Drozier v. Brereton*, 15 Beav. 221, holding trustees liable for not making inquiry as to security of an investment, although the trust deed contained a provision that they should not be responsible for deficiency in title or value of securities. *Fenwick v. Greenwell*, 10 Beav. 412, where a settlement contained a covenant and agreement that £5,000 stock, the property of the intended wife, should be transferred to trustees. The trustees, after the marriage, took no steps to enforce the transfer, and the stock was sold by the husband, and the proceeds misapplied. The trustees were held liable, although there was an indemnity clause providing that they should not be liable for any casual or involuntary loss without their wilful default, but for such money only as should actually come into their hands.

7. *Matter of Mallon* (1904), 43 N. Y. Misc. 569, 89 N. Y. Supp. 554. Compare *Elliott v. Turner*, 13 Sim. 477, holding that neglect may be wilful, though unintentional; *Connolly v. Connolly*, 17 Ir. Ch. Rep. 208, holding that mere negligence or imprudence may be wilful default.



default, within the meaning of the testator's will" and that "therefore he should be surcharged with the same."

In a New Jersey case<sup>8</sup> an indemnity clause provided that neither of two trustees "shall be held responsible for the acts, omissions, or faults of the other in which they did not jointly participate, or of which they are not jointly guilty and that their respective liability and accountability shall not exceed beyond the exercise of ordinary care, diligence and fidelity." This was held not to relieve a trustee from liability for any misfeasance by his co-trustee, unless he takes measures, by suit or otherwise, to enjoin or to compel restitution of the property and its application according to the terms of the trust.

**§ 48. Examples and Construction of Indemnity Clauses—Employment of Agents.** An English text writer" states that: "In conformity with the rule laid down in *Ex parte Belchier*, Amb. 218, s. 31 of Lord St. Leonards' Act (22 & 23 Vict. c. 35), enacted that every instrument creating a trust should be deemed to contain a clause exonerating the trustees from liability 'for any banker, broker, or other person, with whom any trust moneys or securities may be deposited'—a clause which, we may observe, is, nevertheless, not uncommonly inserted, in similar terms, in wills and settlements. But this clause does not authorize a delegation of the trust in any case in which there is no 'moral necessity from the usage of mankind' for the employment of an agent; per Lord Selborne, in *Spright v. Gaunt*, 9 App. Ca. p. 5.

And the true effect of such a clause, which is, in fact, but declaratory of the law, is that it throws the

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8. *Crane v. Hearn* (1875), 26 N. J. Eq. 378.

9. *Godefrois' Law of Trusts* (1891), p. 234.



burden of proof upon those who seek to charge an executor or trustee with a loss arising from the default of an agent, when the propriety of employing an agent has been established. *Re Brier, Brier v. Evison*, 26 C. D. 238. See *Rchden v. Wesley*, 29 Bea. 213."

## CHAPTER XI

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### Trustees for Bond Issues

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§ 49. **Preliminary.** One of the most important uses of the modern trust company is where by a writing somewhat similar to an escrow agreement, but greatly more important for the trust features therein embraced, the company participates as trustee in behalf of bondholders of a mortgagor.

§ 50. **Form of Instrument to Secure Bond Issues.** These instruments are ordinarily called mortgage deeds of trust. They convey property in trust for the security of owners of negotiable bonds to be issued in serial number up to the amount prescribed in the writing. When such an instrument is accepted it is said that: "A trust in fact and in law, as well as in name is (was) created for the security" of such owners.<sup>1</sup>

It is further said in this case that: "In trusts of this nature, responsible, reliable and intelligent parties are commonly selected to receive them, for the purpose of assuring the creditors (that is, the future bond holders) that they will be faithfully executed for their benefit, and their interests in the property protected as far as that can be done by fidelity and attention on the part of the trustee. As to these securities, it has very properly been said that the salability of the bonds depends in no inconsiderable degree upon the character of the persons who are selected to manage the trust."

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1. *Merrill v. Farmers Loan & Trust Co.* (1881), 24 Hun. 297.

As I have already said, it is not character so particularly that is looked to where a trust company is selected, as is the fact of its responsibility, its permanence, the supervision that the state exercises over its affairs, its segregation of its liability for its acts as trustee from that of its general liability and its holding itself out as equipped for the performance of its duties. It may never be said that a trust company may not acquire a reputation for intelligent and faithful performance of duty, because of the character of its managers and their pride in the history of the company. As a business asset, however, the reliability of a corporation is principally in the laws behind its charter.

As to the advisability of appointing trust companies as trustees for bond issues, "Palmer's Company Precedents" (British), Part III, at page 48, states: "In a good many cases, especially those in which it is likely that there will be a succession of dealings by way of sale, investment, purchase, lease, etc., it is considered preferable to appoint a trust company to be the sole trustee. Ordinary trustees cannot always be found when they are wanted; they take holidays, get ill, go abroad, and die; whereas a trust company is always ready to attend to business. If some of its directors are absent, others remain; and it has legal advice always at hand. Its business is to facilitate trust matters, and its credit depends upon its doing business in a prompt and efficient manner."

**§ 51. Legality of Such Instruments.** The United States Supreme Court, in speaking of a mortgage running directly to bondholders of a corporation, said: "The frame of the mortgage now sought to be enforced differs from the ordinary trust deed or mortgage by

which the payment of railroads bonds is secured. A trustee is ordinarily named, to whom the security runs as mortgagee, and the instrument recites that the mortgage is made to him in trust to secure the bonds described to the holders thereof. Here the mortgage is made directly to the persons holding the bonds, who are named and their several interests described."<sup>2</sup> This was said in 1873 and seems to show that the form therein described had obtained long enough for it to have come into general use. An early decision in New York<sup>3</sup> shows that a trust deed to secure corporate bonds was legal and the trust therein not one under the statute of uses and trusts, but a mere mortgage.<sup>4</sup> In a later supreme court case it was said: "The instrument, we think, though in form a deed of trust, was substantially a mortgage. It was delivered to the trustees and duly recorded. The bonds were sold in different markets to *bona fide* purchasers, and they are now outstanding."<sup>5</sup> A great many other cases might be cited where the legality of such instruments are recognized and enforced and no point was established against their validity.

**§ 52. Active Nature of Trusteeship for Bond Issues.** There is something more in the trusts assumed by trust companies for the issuance of bonds by a corporation than a dry or naked agency. For example, it was conceded without objection—at least no objection appears of record—that a trust company as

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2. Nashville, etc., R. R. v. Orr (1873), 85 U. S. (18 Wall) 471, 21 L. Ed. 810.

3. King v. Merchants' Exch. Co. (1851), 5 N. Y. 546.

4. See, also, Minnesota v. Duluth, etc., R. Co. (1899), 97 Fed. 353, 359.

5. Platt v. Union Pac. R. R. (1879), 99 U. S. 48, 57, 25 L. Ed. 424. See, also, McLane v. Placeville, etc., R. Co. (1885), 66 Cal. 606, 6 Pac. 748; Butler v. Rahm (1877), 46 Md. 541.

trustee for the security of the bonded indebtedness of a railroad could maintain a suit to enjoin the enforcement of a statute prescribing railroad rates.<sup>6</sup> In this case, as it appeared in the Circuit Court,<sup>7</sup> it was urged that the trust company showed no right to sue and that there was collusion between it and the railroad, but the court said, speaking of several trust companies complainants in different suits consolidated for one decision, that: "The complainants here show an equitable interest in the fair earnings of the roads; they show actual ownership and possession of the mortgage securities of the roads," and that "said railways are coerced by the defendants, armed with the railroad commission act, and the directors cannot exercise their judgment and discharge their duty as they should and would but for the said coercion." In other words, the trust company had the right to intervene in behalf of bondholders and prevent waste of assets, out of which earnings to pay bonds and interest were looked for.

And where a trust company as trustee in a mortgage deed to secure the bonds of a telephone company brought suit to enjoin a city from removing its poles and wires in alleged violation of a franchise granted to the company, it was said: "The general principle is believed to be settled that the trustee, independent of the provisions of the trust deed, has the power, and it is his duty, whenever the necessity arises, to invoke the aid of a court of equity to preserve the trust estate."<sup>8</sup>

And it has been said that: "When it is necessary

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6. *Reagan v. Farmers Loan & Trust Co.* (1894), 154 U. S. 362, 38 L. Ed. 1014.

7. *Mercantile Trust Co. v. Railroad, et al.* (1892), 51 Fed. 529, 536.

8. *Old Colony Trust Co. v. Wichita* (1903), 123 Fed. 762; affirmed (1904) 132 Fed. 641.

to preserve the property the trustee may ask the appointment of a receiver to prevent the subject-matter of his mortgage being impaired and wasted without waiting until there has been default, either in the payment of the principal or interest on the indebtedness secured.”<sup>9</sup> There are manifold instances of suits by trustees where the integrity of a corporation’s property is impaired or threatened, and so certain did it seem that it was the right and duty of the trust company to sue that no point was made.<sup>10</sup>

Where the coupon holders under a trust mortgage are very numerous and are unknown to the trust company and a question arises for judicial advice in the matter of the distribution of certain moneys on special deposit to pay coupons, it was held by a majority opinion, that the trust company could bind all of the bondholders of the company.<sup>11</sup>

As showing how greatly trustees under a railroad mortgage are regarded as fully representing those whom it secures I submit the following from a West Virginia case:<sup>12</sup> “Notice to trustees under an ordinary mortgage-deed of a railroad company is notice to the holders of the bonds secured by the mortgage. Such trustees are considered in the light of agents for the negotiating of the loan. They act for those who lend their money

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9. *Farmers L. & Trust Co. v. Meridian Waterworks Co.* (1905), 139 Fed. 661.

10. *Baltimore v. Baltimore Trust & G. Co.* (1897), 166 U. S. 673, 41 L. Ed. 160.

11. *Holland Trust Co. v. Sutherland* (1904), 177 N. Y. 327, N. E. But all the bondholders are necessary parties to a suit to authorize a sale, change or compromise of the security pending default, when no such power is expressly given to the trustee in the trust deed. *Colorado & Southern Ry. Co. v. Blair* (1915), 214 N. Y. 497, 108 N. E. 840.

12. *Fidelity, etc., Trust & S. D. Co. v. Railroad Co.* (1889), 32 W. Va. 244, 259, 9 S. E. 180.



on the security of the mortgage. They are charged with the duty of protecting the interests of the bondholders, who are unconnected individuals, having no ready means of acting together except through trustees, whom the law appoints to act for them. Notice to the trustees is held to affect the title in their bonds with reference to incumbrances upon the trust property. Actual notice to the trustees of a prior equitable mortgage is notice of it to the bondholders, who therefore take their bonds subject to the legal consequences of the incumbrance."<sup>13</sup>

This principle would seem to have its limitations, however, to precisely the kind of bondholders spoken of, as a late decision by the supreme court of Illinois shows, or at least this court refused to recognize it in a case of a mortgage, securing bondholders, upon a leasehold in city lots.<sup>14</sup>

The principle of a trustee of an active trust being capable of acting of his own duty and responsibility so as to bind the beneficiaries is fully discussed in "Trust Estates as Business Companies,"<sup>15</sup> where are cited many authorities, especially where "the *cestuis que trustent* are numerous and constantly changing by death, removal, etc., and being beyond the jurisdiction"<sup>16</sup> of the court.

These bond issues are negotiable in form and the principle of intent being to vest with the trustee every

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13. See, also, Jones on Ry. Securities, Sec. 263; Pierce v. Emery (1856), 32 N. H. 484, 521; Miller v. Railroad (1863), 36 Vt. 449.

14. Unity Co. v. Equitable Trust Co. (1903), 204 Ill. 595, 68 N. E. 654.

15. Sec. 101, et seq.

16. Kerrison v. Stewart (1876), 93 U. S. 155, 160, 23 Law. Ed. 843; Bushong v. Taylor (1884), 82 Mo. 660, 670.

right and duty to take care of the interests of holders of such paper seems an absolutely necessary one for the world of business. In such cases the law accommodates its ruling to the usages of business, the presumption of intent furnishing the basis for the principles of law declared.

§ 53. **Theory and History of Mortgage-Deeds for Bond Issues.** It has been said that the advent of corporation bonds secured by a mortgage deed of trust was when steam railroads began. The bond theory as a means of aggregating the contributions of many small investors in the building up and prosecution of large enterprises is an extension merely of the stockholder theory. The latter theory, however, was insufficient for such enterprises as were encouraged by the government in the making of large land grants out of its extensive domain, thereby creating an expectant interest, upon which bond issues could be predicated.

Further than this, projected railroads appealed to communities along proposed routes for county and municipal aid, and, indeed, state aid and state guarantees often were afforded. Like government land grants, these concessions were taken into account in such a large way, that there sprang into existence confidence in railroad enterprises wholly apart from the tangible property, that would arise out of the contributions of stockholders alone. The same observation applies where a "bonus" is offered in the way of a site or subscription by a municipality or inhabitants to secure the location of a manufacturing or other company.

The making of these mortgage deeds of trust preceded the trust company as a business institution in this country and individual trustees were chosen. Take

for example a case where a railroad mortgage deed of trust given prior to 1865<sup>17</sup> was decided, the trustees were individuals, but of the two trustees one had died and the other, "becoming old and unwilling to perform the trust, the Wayne Circuit Court, in 1864, appointed the complainant" in his place. And so a mortgage deed of trust securing bonds of a mining company executed in 1867, authorized individual "trustees or the survivor of them" to take steps upon default.<sup>18</sup>

The trust company became the natural agency in such affairs and legislation recognized a business need.

**§ 54. Express and Implied Covenants in Mortgage-Deeds of Trust.** It has been said that in the ordinary railroad mortgage "the trustee enters into no positive covenants, but accepts the trust which provides in express terms the duties of the trustee in the event of default in the payment of interest and resulting foreclosure and sale."<sup>19</sup> But there was derived from the instrument an implied covenant in the execution of the acceptance by the trustee. This was said to create "the relation of trustee and *cestui que trust* between it and future bondholders."

This mortgage-deed specified the purpose for which the net proceeds of bonds sold should be paid out to the company on orders and requests, "which shall include a written statement or memorandum declaring the purpose or purposes, they are to be appropriated for." This was not observed by the trust company trustee, but the trustee was exonerated by a majority of the court, be-

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17. Pullan v. Cincinnati, etc., R. Co. (1865), 4 Biss. 35, 20 Fed. Cas. 32.

18. The Central Gold Min. Co. v. Platt (1870), 3 Daly (N. Y.) 263.

19. Rhineland v. Farmers Loan & Trust Co. (1902), 172 N. Y. 519, 65 N. E. 499.

cause at the time of suit bonds outstanding were but 25 out of 15,000, and these were acquired after the breach of trust had occurred, and an examination "would have disclosed a condition of affairs calculated to satisfy a reasonable man that the securities were of little or no value."

The dissent in this case, which was agreed to by three of the seven members of the court, contends, that the implied covenants were not to be excused by any such reasoning as the majority adopted. The dissenting opinion said: "The trust imposed on defendant (the trust company), which it in terms accepted, and which, at least by implication, it covenanted to perform, was not a general one by which it was authorized to issue the bonds and transfer other proceeds to the party of the first part (mortgagor) or others whom it should designate, or to dispose of the proceeds in that manner, but it was a trust, which, while it conferred on the defendant the property of the other parties to the agreement, yet specifically restricted the defendant as to the use to be made of such bonds or proceeds, and required it to apply them only to the purposes specially enumerated, to be ascertained in the manner provided. \* \* \* If that was not the intent of the defendant, but it intended to ignore or disregard the provisions of the agreement and permit the entire property of the corporation to be squandered, then it intended to commit a fraud upon the bondholders and others who were interested in the contemplated railroad."

The two opinions agree in general principle, but the majority held that the implied covenant did not come within the twenty year statute of limitations as the express covenant did.

There is the same distinction in a federal decision in regard to statute of limitations in which the same mortgage deed was involved.<sup>20</sup>

While these cases distinguish between express and implied covenants, so far as the statute of limitations is concerned, they nevertheless show the active duties imposed on a trust company undertaking this kind of a trust. The objection as to the statute of limitations easily might be avoided by making other covenants, than the one to foreclose on default, express covenants.

**§ 55. Details in Form of Mortgage Deeds of Trust.** The form of a mortgage-deed of trust as perfected after much litigation may be referred to as somewhat typical in its nature. It conveys the fee to the trustee; provides for grantor remaining in possession until default; that grantor will pay the bonds and coupons secured, they being described in serial numbers; that grantor may sell old material free from the mortgage-deed of trust; sometimes providing for trustee releasing portions of the property upon condition that proceeds are turned over to trustee or reinvested in other property; that grantor shall pay all taxes and liens and maintain the property in repair; that principal shall be declared due upon default in interest, either upon initiative of the trustee or by a certain proportion of the bondholders. If it is provided that the bonds shall become due after thirty days from default in payment of coupons, this is self-executing;<sup>21</sup> that the trustee may enter upon default; that the trustee be vested with power

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20. *Frishmuth v. Farmers' Loan & Trust Co.* (1899), 95 Fed. 5; affirmed (1901), 107 Fed. 169.

21. *Rumsey v. People's Ry.* (1900), 154 Mo. 215, 55 S. W. 615; *New Jersey Paper Board & Wall Paper Mfg. Co. v. Security Trust & Safe-Deposit Co.* (1899), 57 N. J. Eq. 603, 42 Atl. 746.

of sale. This, however, is regarded as an alternative and not an exclusive remedy.<sup>22</sup> A provision is generally inserted exempting the trustee from any and all liability except for willful misconduct or gross negligence. Also the instrument should provide for the appointment of a new trustee in case of resignation or removal.

This is the ordinary frame of a mortgage-deed of trust. There may be other provisions agreed upon by the parties, and so far as bonds and coupons are secured, it is provided also that the trustee shall certify on the bond that it is one of the issue referred to as being secured by the mortgage-deed it purports to come under. Examples of various "trustee clauses" and judicial construction thereof are contained in the appendix to this book.

### § 56. Nature and Extent of Implied Duties.

Mortgage trustees "are regulated by the general rules of law which affect all trustees."<sup>23</sup> In the absence of express limitations, they should "exercise the care and diligence which would naturally be expected of an intelligent person acting in like circumstances to protect his own mortgage."<sup>24</sup> Such a person would naturally examine the title and the security. He would ascertain that the instrument was legal in form and authorized by law and by the corporation, and was properly signed. He would see that the mortgage was recorded. He would examine the property at intervals to ascertain whether its value was depreciating. He would ascer-

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22. *Dow v. Memphis & L. R. R.* (1884), 20 Fed. 260; *Morgans L. & T., etc., Co. v. Texas, etc., Ry.* (1890), 137 U. S. 172, 34 L. Ed. 625; *McFadden v. Mays Landing, etc., R. R.* (1891), 49 N. J. Eq. 176, 22 Atl. 932.

23. *First Nat. Ins. Co. v. Salisbury* (1881), 130 Mass. 303.

24. *Patterson v. Guardian Trust Co.* (1911), 144 N. Y. App. Div. 863, 129 N. Y. Supp. 807.



tain that adequate insurance was maintained and that taxes were paid. Upon default in payment of interest or principal he would bring foreclosure proceedings. And he would be prepared to bid the property in, so as to prevent its disposal at a price that would not protect the mortgage loan. Mortgage trustees, however, do not usually care to assume such responsibilities, and to protect themselves therefrom, limitations and specific powers are inserted in the trust deed.

It appears to be necessary to negative most of the duties just enumerated to prevent their assumption by the mortgage trustee.<sup>25</sup> And though it would appear that such a trustee has the implied power to bid at a foreclosure sale in order to protect the bondholders,<sup>26</sup> it is the usual and safer practice to specifically provide for this contingency.

In addition to the duties implied by the acceptance of such a trust, the very terms of the deed will necessarily raise implications in the sense referred to in an early case,<sup>27</sup> where it was said that:

“All contracts are, more or less, subject to implications, constructive additions, and implied limitations. These are the powers by which courts, in matters of contract, are enabled to make a brief memorandum, which does not express one-tenth part of what is intended, speak truly, and fully the mind of the parties.  
\* \* \* But upon no subject is there so much demand for the exercise of construction, and of judicial implications, as in regard to trusts, and especially trusts of

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25. See Appendix, page 460.

26. *Nay Aug Lumber Co. v. Scranton Trust Co.* (1913), 240 Pa. St. 500, 87 Atl. 843, 35 Am. & Eng. Anno. Cas. 235.

27. *Sturges v. Knapp* (1858), 31 Vt. 52.

this complicated and public character," *i. e.*, mortgage trusts given to secure the issuance of bonds.

**§ 57. Liability of Trustee for Damages for Breach of Trust.—Parties.** Failure to properly fulfill an express or implied duty under the trust deed imposes liability to suit for damages.<sup>28</sup> This liability runs only to the mortgagor and to the bondholders. "Strangers to the trust deed" cannot hold the trustee responsible for performance or non-performance of the trust.<sup>29</sup> The question of a single bondholder suing in his own behalf was thus commented upon in a New York case:<sup>30</sup>

"The cause of action, if any, for neglect of duty on the part of the trustee and for an accounting, was in the corporation or in the bondholders, or both, and could not be enforced by a single bondholder in his own right, but only by an action by all the bondholders or by a representative action in their behalf, or by an action by the corporation for them, or by both the bondholders and the corporation. The liability of the respondent is limited, and it runs to all of the bondholders, and the amount of its liability to them constitutes a fund in which they are all interested."

**§ 58. Liability for Misrepresentations as to Quality and Extent of the Security.** The trustee is not responsible for the accuracy of statements indorsed upon the bond or contained in the trust deed as to the

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28. See note on "Liability for Negligence of Trustee in Corporate Mortgage to Bondholder," 35 Am. & Eng. Anno. Cas. 239-241 (1915-A).

29. *Kaulbach v. Knickerbocker Trust Co.* (1911), 148 N. Y. App. Div. 331, 132 N. Y. Supp. 350.

30. *Knickerbocker Trust Co. v. Condon* (1911), 147 N. Y. App. Div. 871, 133 N. Y. Supp. 95, affirmed without opinion (1914), 212 N. Y. 613.

quality and extent of the security.<sup>31</sup> An extra precaution, however, against claims of this character is provided by inserting a specific clause to that effect in the trust deed.<sup>32</sup>

The duties of the trustee are ordinarily so far removed in this regard that it has no presumptive authority to make representation to a proposed purchaser as to the value of bonds or the relative priority of the mortgage.<sup>33</sup> But a fraudulent statement by a trust company, made by duly authorized officer or employe, will, of course, render it liable for the damage caused thereby.<sup>34</sup>

**§ 59. Instructions of Mortgagor and Bondholders as Protection to Trustee—Majority Rule.** A trustee is protected from liability to a bondholder, whose coupons are excepted from payment, where it so acts under instructions from the mortgagor, for, in respect to payment of interest it was acting as the agent of the debtor corporation.<sup>35</sup> But with relation to its duties as trustee, the trust company is acting for the bondholders. Instructions or acquiescence by them should be sought, if there is doubt as to what should be done in their behalf, or advice of the court should be secured in the manner set forth in the next section of this book.

The bondholders who sanction acts or omissions of

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31. *Tschetinian v. City Trust Co.* (1906), 186 N. Y. 432 N. E.; *Dreifus v. Union Savings Bank & Trust Co.* (1913), 38 Ohio Cir. Ct. R. 46; *Byers v. Union Trust Co.* (1896), 175 Pa. St. 318, 34 Atl. 629; *Hunsberger v. Guaranty Trust Co.* (1914), 150 N. Y. Supp. 190.

32. See Appendix, page 468.

33. *Davidge v. Guardian Trust Co.*, 203 N. Y. 331, 96 N. E. 751, reversing 136 N. Y. App. Div. 78.

34. *Nash v. Minnesota Title Ins. & Trust Co.* (1893), 159 Mass. 437, 34 N. E. 625.

35. *New England Water Co. v. Farmers' L. & T. Co.* (1900), 54 N. Y. App. Div. 309, 66 N. Y. Supp. 811.

the trustee, "whether by previous consent or subsequent ratification," are estopped from claiming that such acts or omissions constitute breaches of trust.<sup>36</sup> When a majority of the bondholders seek to instruct the trustee, another question is involved, for then the minority have rights which others may not waive for them. It has been said that: "It is not improper that (the trustee) shall be governed by the voice of the majority, acting in good faith and without collusion, if what they ask is not inconsistent with the provisions of the trust."<sup>37</sup> Frequently the trust deed contains a provision that "in all matters of judgment, discretion or policy \* \* \* the trustee shall be fully justified and protected in acting in conformity with any request of the holders of a majority in amount of the bonds."<sup>38</sup>

The limitations of the "majority rule" were thus stated by Circuit Judge Lurton: "But the trustee cannot blindly submit to the domination of the majority. He should be reasonably satisfied that the general interests of the trust will be best subserved by acting with the majority."<sup>39</sup>

**§ 60. Application by Trustee for Advice and Instruction of the Court.** When in doubt as to its obligations, mortgage trustees have recourse to an application to the court for advice. In fact, they have been

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36. *Butterfield v. Cowing et al.* (1889), 112 N. Y. 486, 20 N. E. 369.

37. *Shaw v. Little Rock & Forth Smith R.* (1880), 100 U. S. 612, 25 L. Ed. 757.

38. *Columbia Knickerbocker Trust Co. v. Ithaca St. R. Co.* (1913), 141 N. Y. Supp. 249. That the majority may delegate to a committee the power to give instructions to the trustee, see *Fidelity Trust Co. v. Washington Oregon Corporation* (1914), 217 Fed. 588.

39. *Toler v. East Tennessee, V. & G. Ry. Co.* (1894), 67 Fed. 168, 180; see, also, *Columbia Knickerbocker Trust Co. v. Ithaca St. R. Co.* (1913), 141 N. Y. Supp. 249.

censured for not so applying. Thus in the Pennsylvania case,<sup>40</sup> where the trust company turned over a balance to a mortgagor, as a result of a mistake as to its duties, the Court said:

“The lawful claims of the bondholders are not to be refused on account of mistake of this nature by the trustee. If it was in doubt as to the manner in which distribution of the funds was to be made, it might have made application to the court, and secured a judicial order of distribution. Having made voluntary distribution without application to the court, it did so at its own risk.”

The limitations upon the right of a trustee to file a bill to obtain the instruction of the court was thus stated in *Holland Trust Co. v. Sutherland*:<sup>41</sup>

“It is well settled, where the trust instrument is plain in its terms and the duty of the trustee clear, he is not justified in coming into a court of equity asking for instructions. It is equally clear that where he is called upon by the nature of his trust to exercise discretionary power, the court will not instruct him in such an emergency.”

It should be further noted that a trustee is not entitled to instructions, except where there is an actual dispute as to his legal obligations.

An instance of an actual dispute as distinguished from a mere mooted question is afforded in the case cited.<sup>42</sup> Here the Court said:

“An actual dispute has arisen between the mortgagor and the trustee, and a court of equity has been

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40. *Appeal of Colonial Trust Co.* (1913), 241 Pa. 554, 88 Atl. 798.

41. (1904) 177 N. Y. 327.

42. *Struthers Coal & Coke Co. v. Union Trust Co.* (1910), 227 Pa. St. 29, 75 Atl. 986.

asked to decide the precise question which has arisen. The trustee differed sharply with the debtor, in its interpretation of the language of the bonds and mortgage, and undertook to require more from the mortgagor than it deemed was required of it, under the contract. Certainly this raised a question proper for the court to decide, and in its determination the court was not dealing with any mere abstract proposition. It was dealing with known facts, in a genuine contest."

**§ 61. Singleness of Duty Owed by Trustee in Bond Issues.** In the representation of the interests of bondholders, a trustee is not obliged as to any proceeding he institutes in their behalf to produce the bonds themselves. In a case where it was objected that a decree of foreclosure could not be justified unless the bonds secured by the deed of trust were first produced it was said: "It was sufficient to prove that the bonds were valid and were outstanding obligations of the company (mortgagor), and it was not necessary to show in whose hands they were, or to require their production. Indeed, an order to that effect could only result in delaying a decree indefinitely, since in cases of corporate mortgages the bonds are often widely scattered, owned in foreign countries, or by persons totally ignorant that a suit for foreclosure is in progress. Months and even years might be required to produce them all. The practice has been to order a decree for foreclosure and sale without their production" (citing cases).<sup>43</sup> This but illustrates how completely are the rights of *cestuis que trustent* under mortgage deeds securing bond issues committed to the care of the trustee and, correspondingly, there is implied

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43. *Dickerman v. Northern Trust Co.* (1900), 176 U. S. 181, 44 L. Ed. 423.



the singleness of its duty in the premises. I will refer to some cases, which leave nothing to inference as to this.

§ 62. Trustees Under Conflicting Mortgages.—**Intervention by Individual Bondholders.** It has been said that: "It has been well held that, in general, courts can deal with bondholders only through their trustee, and that it is not to be tolerated that each individual bondholder could at his own suggestion, proceed to assert his rights when they can be as well asserted through a trustee."<sup>44</sup> But: "If it appears that the trustee refuses or neglects to act or stands in a hostile position, or has assumed a position prejudicial to the interests of the *cestui que trust* the rule of convenience is put aside and the *cestui que trust* admitted to represent his rights because in such case the trustee has not or cannot fully and faithfully represent them."

All of this was said in a case where a trust company was the trustee under several mortgages giving first, second and third liens, and a committee claiming to represent holders of bonds under the second mortgage asked to be allowed to intervene, because the trustee occupied inconsistent positions, it being its interest under one mortgage to cut off equities in another mortgage and under the latter to avoid or delay foreclosure, and furthermore there was a conflict of interest as to whom expenses of administration and foreclosure should be charged. It also appeared in the case that the trust company held a debt against the mortgagor company secured by collateral which it proposed to redeem with the proceeds of receiver's certificates proposed to be

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44. Farmers Loan & Trust Co. v. Northern Pac. R. Co. (1895), 66 Fed. 169, 174.

issued. Under the circumstances the court decided to allow representation by the bondholders other than by the trustee, or rather additionally to the trustee, but it said: "Care should be taken, that, while the right should be granted, it should be protected from abuse. And to that end I have come to the conclusion to allow but one individual of each of these committees to be represented in the suit, to the end that each mortgage interest shall thus have representation."

Here it is seen that representation was not allowed to any individual bondholder, but, as a matter of grace, representation was granted to certain individuals as representatives respectively of classes of bondholders. This does not seem to nullify or even mitigate the duty of the trustee, but merely directs how the court may better determine his duty, under conflicting, or possibly conflicting obligations, to its *cestuis que trustent*.

In a later case where the same trust company was named trustee under several conflicting mortgages, Lacombe, C. J., said: "These several mortgages are necessarily conflicting, and it is manifestly impossible for the trustee to fairly represent both sides in the resulting controversies, except by assuming such a position of neutrality as would seriously affect the force with which such conflicting interests are to be presented for the consideration of the court. Under such circumstances it would seem appropriate to substitute new trustees under all the conflicting mortgages but one. This, however, has not been done in the circuits where the property lies, and will not, therefore, be done here, the admission of representatives of these bondholders being probably sufficient to accomplish the object desired. \* \* \*

The practice, quite common in railroad financiering, of

making the same person trustee, under a succession of mortgages, each covering the whole or some part of the property, is no doubt a convenient one, and when disaster overtakes the road, it may facilitate the effort to reorganize by making it easier to constrain the various conflicting interests to make concessions to each other; but from the point of view of a court which is called upon to adjudicate between such conflicting interests, such practice is unsatisfactory, and, unless corrected by substitution, or otherwise, after suit brought, may tend to induce judicial error and may lead to great injustice.<sup>45</sup>

It is a principle firmly established that it is greatly discretionary whether a bondholder or group of bondholders will be allowed to intervene in a foreclosure case,<sup>46</sup> and it is merely more certain that when a trustee is such under conflicting deeds of trust, intervention will be granted, but, as I have said, there is no substitution of another trustee.

The United States Supreme Court has pronounced very definitely upon the question of the legal effect of a trust company or other trustee being such in conflicting mortgage deeds of trust.<sup>47</sup> In this case a trust company was trustee under first and second mortgage-deeds of trust, and there was foreclosure of the first deed. Various negotiations were had between bondholders of the two deeds of trust and there was alleged to be an understanding as to a sale and reorganization for all bondholders to acquire certain interests in the reorganized

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45. *Farmers Loan & Trust Co. v. Northern Pac. R. R. Co.* (1895), 70 Fed. 423. See, also, *Penna. Steel Co. v. N. Y. City R. Co.* (1908), 160 Fed. 222.

46. *Land Title & Trust Co. v. Asphalt Co.*, 127 Fed. 1; *Land Title & Trust Co. v. Tatnall*, 132 Fed. 305; *Continental & Commercial Trust & Savings Bank v. Allis-Chalmers Co.* (1912), 200 Fed. 600.

47. *Robinson v. Iron Ry. Co.* (1890), 135 U. S. 522, 34 L. Ed. 276.

company. There was demurrer to a bill to set aside the sale.

The court in affirming the judgment sustaining the demurrer said: "As to the allegation in respect of the inconsistent positions of the Trust Company as a trustee under both of the mortgages, no collusion on the part of that company is averred; nor is it alleged that the company, so far as it did or could represent the second mortgage bondholders was unfaithful to its trust. There having been an admitted default on the first mortgage and the foreclosure proceedings having been properly instituted, there is an absence of any allegation in the bill that the second mortgage bondholders, if they had been parties to the suit otherwise than through the trustee, could have taken any steps which would have prevented the decree of foreclosure. The Trust Company was a trustee under the first mortgage, which was prior in right to the second. \* \* \* Moreover, the bill alleges that the foreclosure suit was a suit to foreclose both of the mortgages, and, of course, according to their respective priorities. The bondholders were represented by their trustee, as is established by numerous decisions."

This language amounts, as I understand it, to saying, that the rights of bondholders under a prior mortgage cannot be affected by subsequent acts by parties under subordination to the prior mortgage and, if acts of these parties created an inconsistency they could not lay by and afterwards urge it to the detriment of those whose rights were paramount. It certainly could not be asked by them that the trustee under the former mortgage be removed or disqualified. At most, all they could ask would be that the company trustee under the second mortgage be removed, and as long as they did not do this,

they must abide by the situation that had been created and under which they derived their rights. As this bill was filed after the sale, objections then made for the first time could not be urged to invalidate that sale. It is interesting to note that the court said that: "The bondholders (not some of them, but all of them) were represented by their trustee."

Upon parity of reasoning it is held that the fact that a trust company holds some of the bonds as collateral security, and, therefore, is not disinterested, is equally unavailing as to its proceeding by foreclosure.<sup>48</sup> It was said: "In bringing to a sale the mortgaged property it acts for the benefit of every bondholder who may show his right to share in the proceeds of sale. The question of where the proceeds of the sale shall go is not a question which concerns the Central Trust Company, as complainant in the cause, or as trustee under the mortgage under foreclosure." This question is slightly different from that where the inconsistency of position arises out of one being trustee as to conflicting interests, because it is brought about by the trustee acquiring personally an inconsistent interest. The other way he is vested by others with a power inconsistent with the former grant of power. It seems that his personal act would have disqualified him to carry out his former trust duty. This ruling must have been made by Lurton C. J. as applicable to a case which came under "the practice in railroad mortgage bond cases to postpone the final determination of all such questions" as related to the validity and amount of bonds held by each holder, a practice followed in very many cited cases. It was

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48. *Central Trust Co. v. Cincinnati H. & D. Ry. Co.* (1908), 169 Fed 466.

thought that no case was stated for intervention, no fraud or collusion being charged.

**§ 63. Trustees Under Conflicting Mortgages—Continued.** Though there is inconsistency in a trusteeship where conflicting interests are represented by one trustee, yet there are many practical considerations in its favor. A trustee under mortgage-deeds of trust has well-defined duties and none of its powers are called into exercise, except upon default and the rights of those whom it represents are not strictly conflicting according to legal construction of the instruments appointing it. Subordinate deeds concede, on their face, prior rights and according to their tenor there is no conflict in right that is not recognized in advance. It could be as well said that there could not be the same trustee for a remainderman and legatees given a charge on the remainder interest.

It can never be anticipated, if instruments are clearly drawn, that any clash will arise out of the conservation of the property, for a trustee's duty could not be more or less stringent in this regard, whether it represents one mortgage or all of them, and when it comes to distribution on sale, the practice, as stated above, is to postpone all questions for decision until after the sale is made. If this could be ruled when a trustee's personal interest is concerned, *a fortiori* could it be so thought, when having no personal interest, it is submitting to a court documentary evidence of the rights of all parties claiming interests in the proceeds of sale.

The New York stock exchange condemns the practice of a single trustee for prior and secondary mortgages, but I see no substantial objection to the practice.

I may say in concluding this section that no better



illustration of the objection to inconsistency of interest being a technical, rather than a material objection to a trustee under a mortgage-deed of trust can be given than a Massachusetts case,<sup>49</sup> which refused to consider averments as to a trust company being vested with other powers, which created an opportunity to be untrue to its trust, when there was no averment of culpable negligence, especially as the trust agreement provided for a trustee's removal by a vote in writing of one-third in interest of the bondholders at a meeting called for that purpose.

§ 64. **Removal of Trustee.** A method of removing a trustee is frequently provided in the trust instrument.<sup>50</sup> Such a provision must be followed before legal proceedings for removal are instituted.<sup>51</sup>

An action for the removal of a trustee is properly founded upon allegations that it has acted in bad faith in the prosecution of an action for the foreclosure of the mortgage and in a manner prejudicial to the bondholders, by consenting to the subordination of the lien of the mortgage to certain expenditures and not permitting any bondholders to intervene in the foreclosure proceedings.<sup>52</sup>

The refusal of a trustee to comply with a judgment makes out a *prima facie* case for its removal.<sup>53</sup> Acting as depositary for a bondholder's committee is not inconsistent with its duties as trustee and does not render it liable to removal.<sup>54</sup>

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49. *Dillaway v. Boston Gas Light Co.* (1899), 174 Mass. 80, 54 N. E. 359.

50. See Appendix, page 471.

51. *Dillaway v. Boston Gas Light Co.* (1899), 174 Mass. 80, 54 N. E. 359.

52. *Gibson v. American Loan & Trust Co.* (1890), 58 Hun. (N. Y.) 443.

53. *Harrison v. Union Trust Co.* (1895), 144 N. Y. 326.

54. *Fidelity Trust Co. v. Washington Oregon Corporation* (1914), 217 Fed. 588.

## CHAPTER XII

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### Car or Equipment Trusts

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§ 65. Derivation and Need of Equipment Trusts. The idea of a car trust appears to have been suggested by an early case in Pennsylvania,<sup>1</sup> which instanced a contract made prior to 1833, whereby boats were built by plaintiff and delivered under a form of printed contract. These vessels were for contractors to "boat coal" thereby in the Lehigh and Delaware canals at certain prices per ton, taking on their return only such freight as would not cause interruptions in their regular trips. These boats were to be sold to contractors for specified prices and the boating of coal was to be according to printed regulations made a part of the contracts.

The question before the court was whether, under the installments being paid, the contractor or "boatman," to whom possession was delivered, had any title which could be levied on by his creditors. In an opinion by Gibson C. J. it was said: "By the regulations, which were part of the contract, the persons who had the boat in charge were the company's servants acting under its control. The company was to pay the tolls and the contractor was to take freight from no other quarter except

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1. *Lehigh Coal & Nav. Co. v. Field* (1844), 8 Watts & S. 232.

as back loads. Thus the ostensible as well as the actual ownership was in the company and the possession in its servants." The attachment levied thereon and sale thereunder was held to confer no title to purchasers.

This thought as to boats developed into "Car Trust Associations," which began as unincorporated joint stock associations, as to which the writer has given his views in another work.<sup>2</sup> By analogy they are found within the principles underlying mining partnerships, of which Mr. Justice Field said: "Mining partnerships as distinct associations, with different rights and liabilities attaching to their members from those attaching to members of ordinary trading partnerships, exist in all mining communities; indeed, without them, successful mining would be attended with difficulties and embarrassments, much greater than at present."<sup>3</sup> So railroads need car trust and equipment associations to supply the rolling stock to utilize the rails of steel or iron capital has laid on rights of way. Manufacturing concerns must have ready cash for the supplying of railroads with locomotives and cars, so voluntary associations or trusts were organized to purchase and sell on credit to the railroads, the rolling stock they needed.

**§ 66. Protecting Legislation.** The necessity for protecting sales of equipment on credit was early recognized by legislation, and the variant views of courts as to whether thereby rolling stock contracts amounted to absolute or conditional sales, and as to what were the rights of creditors, both general and mortgage were sought to be made clear. To this end statutes have been enacted in nearly all of the states on the subject of com-

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2. Trust Estates as Business Companies.

3. Kahn v. Smelting Co. (1881), 102 U. S. 641, 645, 26 L. Ed. 266.

panies selling to railroads and street railways the rolling stock they should need providing for the recording of contracts of sale and constructive notice therefrom to subsequent creditors of the road.<sup>4</sup>

While this legislation is far from being uniform among the states, it is seen by decision that such legislation is considered apart from general statutes regarding conditional sale contracts.<sup>4</sup> It was said there of a sale made under the Ohio act for the purchase and sale of railroad equipment, that: "The title to the equipment \* \* \* remained in the vendors until fully paid for." I do not say precisely this result would be attained under all state statutes, though, presumptively, this is intended as generally they authorize conditional sale contracts where there is retention of title as security for purchase money.

**§ 67. Status of Equipment Under After-Acquired Property Clauses.** It was long ago settled that mortgages as to property which passes to the mortgagor subject to a lien thereon remains so subject, any after-acquired property clause in the mortgage to the contrary notwithstanding.<sup>5</sup> In this case it was said: "A mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time. It only attaches to such interest as the mortgagor acquires; and if he purchase property and give a mortgage for the purchase money, the deed which he receives and the mortgage

4. Metropolitan Trust Co. v. R. R. Equipment Co. (1901), 108 Fed. 913, 48 C. C. A. 135.

5. United States v. N. O. R. Co. (1871), 12 Wall 362, 20 L. Ed. 434.

which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage or judgment, or recognizance, can displace such mortgage for purchase money, and in such cases a failure to register the mortgage for purchase money makes no difference. It does not come within the reason of registry laws. These laws are intended for the protection of subsequent, not prior, purchasers and creditors."<sup>6</sup>

In a case in the Sixth Circuit Court of Appeals,<sup>7</sup> there was a contract, in form of a lease, with obligations thereunder called "lease warrants," and Judge Lurton spoke of it as follows: "It is too obvious for discussion that the arrangement under which the railroad company acquired the 10 locomotives in question was no ordinary letting of property for a fixed rental, and that no such thing was really contemplated. \* \* \* The real transaction was a bargain and sale, the title being retained as security for the purchase money. Being property susceptible of separate ownership and separate liens, it passed under the after-acquired property clause of the existing mortgage, subject to the lien of the vendor; the existing mortgages not being purchasers for value in respect of such after-acquired property."

This ruling is fortified by much authority and I think it cannot seriously be disputed.

**§ 68. Safety of Investments in Car Trusts.** While it may be admitted, that for all legal purposes investments in equipment or car trusts associations are safe, yet it is very apparent that they need more of atten-

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6. See, also, *Fosdick v. Schall* (1878), 99 U. S. 235, 25 L. Ed. 339; *Myer v. Western Car Company* (1880), 102 U. S. 1, 26 L. Ed. 59.

7. *Contracting & Bldg. Co. v. Continental Trust Co.* (1900), 108 Fed. 1, 47 C. C. A. 143.

tion by trustees to protect the interests of investors, than where the security is a railroad itself. It may be said that the value of the securities depends upon divers considerations. These may be enumerated as follows: (1) The purchasing railroad company must be looked to as to its general solvency; (2) The real value of the rolling stock sold is to be considered; (3) The duration of the trust and the depreciation that ensues upon use; (4) The probability that a road equipped for traffic in prosperous times may throw back on the sellers what it may not need in periods of depression.

It may be true that where railroads go into the hands of receivers, the courts, customarily deal quite liberally with equipment trusts, but then it is readily seen, that it is its duty to look first to realizing the utmost for bondholders in a mortgage on the road itself. And besides this in contracts authorizing cars not paid for to be retaken by sellers, there might be a great practical difficulty. The right to retake might be freely acknowledged, but the court, looking only to the interest of bondholders whom a receiver represents, might not regard itself bound to assist the seller in retaking. The cars may have been scattered through many states, and be difficult to trace, to say nothing of being retaken and placed in proper custody. The security is not only upon personal property, but upon a class of personal property, which, if thrown back on sellers, would involve not only great expense in being cared for, but ruinous sacrifice in its sale.

**§ 69. Criticism of the Form and Security of Car Trusts. Clauses for Reports to Trustees.** In 1885, Mr. Francis Rawle<sup>8</sup> spoke of this form of invest-

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8. VIII Reports American Bar Association 277-322.



ment being formerly highly esteemed, and of its loss of favor in then very recent times. He next remarks that: "There can be no doubt that car trusts can be so organized that they may be a perfectly safe form of investment, and there is no reason why, with proper care in their creation and administration, they should not again be so esteemed by the business world and regain their former popularity with investors. The value to railroad companies of this new method of obtaining rolling stock is certainly very great, as it enables them to secure it at once at a small present outlay and to use it in such a way that it can pay for itself out of its own earnings."

Since that time these securities have regained their popularity with investors, but criticism of their form, warning against carelessness in their execution and advocacy of greater watchfulness by the trustees have appeared in reports by the "Committee on Railroad Bonds and Equipment Trusts" of the Investment Bankers' Association. One of these reports is included in the Appendix of this book.<sup>9</sup>

In this report the committee well says: "The value of the collateral under any loan and the maintenance of the value of such collateral can be safeguarded to a certain extent by the terms of the indenture. \* \* \* This, however, is but a means to the desired end. \* \* \* The greatest evil today in connection with the problem of Equipment Trusts, the Investment Banker and the Investor is this neglect of investigation and regular oversight."

Investigation and regular oversight are greater burdens than trustees generally are willing to accept. To keep track of such perishable property and see that

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9. Appendix, page 474.

promises to replace lost or worn out cars are kept would require more than ordinary diligence. It is a task for experts in the railroad business. Appreciating this, the Committee have suggested "clauses to be incorporated in Indentures Securing Equipment Trusts,"<sup>10</sup> that provide for reports and certificates of fact to the trustee. This is a compromise arrangement by which it is thought that regular oversight would be secured without the trust company having to make its own investigations.

Another way to make these investments more secure and one that would not require detailed supervision by the trustee is suggested in the following section.

**§ 70. Suggestion that Liens for Equipment be Given Priority by Legislative Enactment.** That the states are responsive to the necessity of making car trusts safe appears from legislation recognizing their legality and providing for recording and constructive notice therefrom. To seek further legislation along this line, is but to follow to a logical conclusion the end in view, namely, adequate protection to the holders of car trust securities. One form which new legislation might take, could be provisions making indebtedness for car equipment a preference debt. The fact that claims that such a preference exists without legislative authority therefor, have been vigorously pushed by learned counsel indicate that it is not a radical idea. Though the Circuit Court of Appeals for the Ninth Circuit in the case cited<sup>11</sup> held that debts for operating equipment could not be preferred over prior mortgages, unless it was necessary

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10. See Appendix, page 485.

11. *Moore v. Donahoo* (1914), 217 Fed. 177.

to enable the receiver to continue operation of the road, it is plain that statute could change this.

Maritime liens for supplies by which vessels are kept in operation take precedence over mortgages whether prior or subsequent.<sup>12</sup> In the article cited it is said: "If the mortgage was prior, the ordinary maritime lien arising on contract being based on the necessities or maritime use of the vessel, is for the benefit of the mortgagee as preserving or bettering the *res*."

Though rolling stock is in a sense personal property, it is a kind of personal property which only may be used on a track, and might be regarded as an improvement of real estate. If it is sold by vendor or mortgagee to satisfy his debt, the market for purchasers is confined to a class, and its collection and removal is attended with much difficulty and expense. It, indeed, can be sold to best advantage with the sale of a railroad which is its owner or mortgagor. It helps in the general sale of the road at about its real worth, in the same way that improvements attached to a mansion or a business place assists in the sale of a lot. It enables the purchaser of the railroad immediately to continue its operation, and without it he would have to expend money or suffer interruption in the traffic enjoyed along with its good will.

In addition to all of this, such legislation would eliminate from foreclosures, contests between bondholders and the sellers of rolling stock. Indeed there would then be no difference in the sale of a railroad under foreclosure and the sale of a farm or a city lot under the same procedure.

A preference of this kind would work no injustice against prior general mortgagees, bondholders or stock-

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12. 26 Cyc. 802.

holders, for it would assist in the securing equipment upon liberal terms and less charges for interest. If equipment cannot be obtained, a railroad can earn no dividends nor interest, and the more reasonably it can be obtained, the larger and more certain is the chance of such interest and dividends.

The advantage of such legislation to trustees would be to relieve them from duties of detailed oversight, which they evidently prefer to avoid, because the recovery of the cars in good or impaired condition, in case of default, would lose its importance in the face of the right to foreclose upon the entire property with a first lien upon the assets for any balance due for the equipment. Any such legislation should be uniform throughout the States. The theory in practical affairs is to unify procedure instead of diversify it. Things having an intimate connection should be joined in remedies, and this should not be prevented because of any technical rules of procedure.

## CHAPTER XIII

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### Transfer Agents and Registrars

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§ 71. **In General.** Appointing transfer agents and registrars are means a corporation adopts to certify the issuance of shares of stock, bonds, notes, or other written evidences of outstanding securities or obligations, and, therefore, but an additional check to prevent over-issue, or fraudulent duplication, or any falsification of evidence as to the truth of a certificate of a share of stock or registered bond which may fall into the hands of an innocent purchaser for value. A corporation does this for its protection against fraud, for the conserving of its property,<sup>1</sup> and to facilitate transfers at markets distant from its home office. Moreover, the delegation of this work to responsible, experienced and properly equipped organizations reduces the risks of legal liability and litigation.<sup>2</sup> The obligation of a corporation in this regard is thus summarized in *Geysler-Marion Gold Min. Co. v. Stark* (1901), 106 Fed. 558, 44 C. C. A. 467, 53 L. R. A. 684: "It is bound to use reasonable diligence in every case to ascertain whether or not a transfer of stock requested is duly authorized by the former owner.

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1. *Fifth Ave. Bank v. Forty-second Street, etc., R. R. Co.* (1893), 137 N. Y. 231, 33 N. E. 378, 19 L. R. A. 331, 33 Am. St. Rep. 712

2. The extent of this liability is reviewed in 30 Am. & Eng. Anno. Cas 1173-1179 (1913-E), and 45 L. R. A. (N. S.) 1076-1083.

to make these transfers that are so authorized, and to prevent those that are unauthorized; and for every breach of this obligation it is legally liable to the parties injured for the damage it thus inflicts.”

**§ 72. Implied Power of Bank to Act as Transfer Agent.** In an early Pennsylvania case<sup>3</sup> a very interesting review is made to determine long in advance of the express conferring upon trust companies of the power to act as transfer agents, whether it was within the implied power of one bank to act as transfer agent for another bank. There was evidence submitted that to accept such an agency was “a usual and accustomed contract among banks, that maintain general business relations with each other.” The opinion speaks of this as a usage of business, saying: “Such usages spring out of necessities and are the best evidence of them.” And: “As the customs and usages of trade are part and parcel of every mercantile contract, so a course of uniform usage, in favor of a particular course of business, prevailing among all banks, foreign and domestic, known to every business man, never called in question by government, never repudiated by stockholders, is stringent evidence of such a course being within the necessary implications of all bank charters.” The opinion goes on to mention the existence of such relations between many Philadelphia banks and banks of other cities, and similarly between New York banks and banks of other cities.

I might add that in view of the usage among banks for those at the money centers of this country to be the correspondent banks of those elsewhere located and the right of the latter to sell to their customers, drafts, known as exchange, upon their correspondents, it would

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3. *Bank of Kentucky v. Schuylkill Bank* (1846), 1 Pars. Eq. Cas. (Pa.) 180.



seem well within the implied power of the banks upon which the exchange is drawn, that the drawers of such bills should satisfy them as to strict regularity in their stock issues. To have exchange on a correspondent bank refused payment not only would injuriously affect the drawer, but also the credit of the drawee bank. It was necessary, indeed, that the credit of all such banks should, as far as possible, be like the reputation of Caesar's wife above suspicion.

The transition from reasoning of implied power to the conferring of express power to trust companies or other corporations authorizing them to become transfer agents and registrars for other corporations was easy and natural.

**§ 73. Implied Power in Banks to Create Transfer Agencies Not Sufficient for Business Necessities. Express Power of Trust Companies.** The arrangements between banks of which I have just spoken, while properly held to be within implied power and of salutary effect, have their evident limitations. When business of the country took on more and more a corporate aspect, and especially all great movements had behind their promotion, furtherance and achievement, corporate agencies, it was but a safeguarding of the public as the investor in these agencies, that they should have the opportunity to prove the regularity of their securities through expressly authorized financial institutions of known responsibility.

Though individuals may act as transfer agents and registrars, there are sufficient reasons why these duties should not be committed to them. The important obligations assumed to the investing public, to the corporation represented, and to its stock or bondholders, justify the

confinement of these functions to corporations that are subject to departmental supervision. The value of these services is negligible unless performed by those whose financial standing is commensurate with the responsibilities assumed.

**§ 74. Possibility of Compelling Corporations to Authenticate Their Securities Through Independent Sources.** It is true that, though many corporations have not resorted to this means of accrediting their securities, it appears to me to be well within the police powers of the state to require that they should do so. As it is, there might arise against a corporation failing to resort to a presumptively disinterested agency for proof of the fact that it has not by fraud, or inadvertance or mistake exceeded its power in so vital a matter, an inference, which would lead a prudent investor to investigate for himself. What are known as "Blue Sky" laws, enacted in several of the states, are examples of attempts by the police power in the direction of assuring the proper issuance of securities. These laws were sustained by the only state authorities<sup>4</sup> yet appearing. Adverse ruling as to their constitutionality, in federal district courts,<sup>5</sup> principally upon the ground that they violate the federal commerce clause, was reversed by the United States Supreme Court.<sup>6</sup>

**§ 75. Transfer Agent Defined.** While I am on the point of a trust company under conferred power acting as transfer agent for another corporation, this does

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4. Ex parte Taylor (1914), Fla. —, 66 So. 292; State v. Agey, 88 S. E. 726 (N. C.).

5. Alabama & N. O. Trans. Co. v. Doyle (1914), 210 Fed. 173; Wm. R. Compton Co. v. Allen (1914), 216 Fed. 537; Bracey v. Darst (1914), 218 Fed. 482; Geiger-Jones Co. v. Turner, 230 Fed. 233, etc.

6. Hall v. Geiger-Jones Co. (No. 438, 439 and 440, Oct. Term, 1916), Merrick v. Halsey & Co. (No. 413, Oct. Term, 1916), and Caldwell v. Sioux Falls Stock Yards Co. (No. 386, Oct. Term., 1910).

not preclude looking for definition elsewhere. Indeed just as we get from the common law the meaning of common law terms in the legislation of our federal government,<sup>7</sup> which itself has no common law, so we may get from the usages of law preceding such conferring of power the meaning of terms employed therein.

Thus I refer again to *Bank of Kentucky v. Schuylkill Bank*, *supra*, where I find a transfer agency spoken of as follows: "What is a transfer agency? It is a very harmless thing. It amounts to nothing more than the witnessing of the conveyance by one person to another of personal property, viz: stock of an incorporated company: And in this case also to furnishing the purchaser a certificate of ownership of such stock, on the surrender of a previous certificate of like character held by the seller. . . This is a very simple business, involving little or no risk or hazard, requiring nothing but ordinary care and fidelity in its performance."

This strikes me as quite an inadequate description of what might be the full measure of the responsibility resting on a statutory transfer agency. If only it saw to the exchanging of one share of stock for a purported share, there would be little reason for its existence. If, however, back of the purported share there is the duty to ascertain whether it is regular, its judgment must or not allow it to be transferred to another. This would involve a running back of the present alleged title to the purported share to its source, from the abstract, so to speak, of the title as shown by the agent's records or other means, if these are incomplete. If it allows the transfer this should be deemed equivalent to a represen-

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7. *Standard Oil Co. v. U. S.* (1911), 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann Cas. 1912 D 734.

tation by it that the new owner is, not only apparently, but really the record owner of a validly authorized share of stock in the corporation professing to have issued it.

In addition to all this a transfer agency ordinarily should see that the stock proposed to be transferred to another is represented by the true owner and his name is not forged. Thus it was held in an English case,<sup>8</sup> where the stock of a registered holder in a joint stock company was left with her broker and he forged her name to the transfer thereof, issuance of a new registered certificate to the supposed purchasers made the company liable to the former holder and it was made to restore her name to the register. It was further held that the giving of the new certificate amounted to "a declaration by the company to all the world that the person in whose name the certificate is made out \* \* \* is a shareholder in the company."

It is easily to be thought that this result could not be avoided by a corporation using a trust company for its transfer agent and the latter ought to be responsible to its employer.<sup>9</sup> It has been expressly held that a purchaser of certificates of stock need not look back of the last registry of transfer.<sup>10</sup>

**§ 76. The Terms "Registrar" and "Registered" Defined.** A "registrar" records transfers by crediting the total authorized issue, and debiting securities issued and outstanding. The object is to safeguard against a total debit in excess of the total credit or in other words to prevent an over-issue. The transfer agent makes the transfer and issues the new certificate. The new certificate, the old certificate and any separate proofs and

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8. *In re Bahia & S. F. R. Co.* (1868), 3 Q. B. 584.

9. See, also, *Machinists' Nat'l Bank v. Field* (1879), 126 Mass. 345.

10. *Winter v. Montgomery, G. L. Co.* (1889), 89 Ala. 544, 7 So. 773.

evidences of right to transfer that may accompany it, are sent to the registrar. If no objections appear, the Registrar thereupon signs the new certificate.

These services were called into use after the Schuyler frauds. Robert Schuyler as transfer agent of the New York & New Haven Railroad issued a large number of certificates to his own brokerage firm and others in excess of the authorized capital of the railroad, involving it and innocent purchasers of shares in extensive and costly litigation.<sup>11</sup>

A "registered" stock is one to which the services of a "registrar" have been applied, but the term "registered bond" means a bond assimilated to the rights of transfer of stock, as distinguished from an unregistered bond that passes from hand to hand without formal transfer.

The New York Appellate Division (First Department) in speaking of registering a bond issue said:

"It was evidently the intention to assimilate the right of transfer and retransfer of the bonds when registered to the transfer of shares of stock in an incorporated company, and the effect, I think, of this arrangement was to place registered bonds and shares of stock of a corporation upon a similar footing as to the requisites necessary for a transfer, so that the owner of the bonds when registered should be protected from loss, theft or embezzlement."<sup>12</sup> The term *registered bond*, was thus defined in a New Jersey case:<sup>13</sup>

"A registered bond is one which is a simple certifi-

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11. See *Mechanics' Bank v. New York & New Haven R. R.* (1856), 13 N. Y. 599, and *New York & New Haven Railroad Co. v. Schuyler* (1865), 34 N. Y. 30.

12. *Clarkson Home v. Chesapeake & O. R. Co.* (1904), 92 N. Y. App. Div. 491, 87 N. Y. Supp. 348.

13. *Benwell v. Mayor, etc., of City of Newark* (1897), 55 N. J. Eq. 260, 36 Atl. 668.



cate of indebtedness, in favor of a particular individual, payable at a day named, with interest at days named. The name of the payee is entered on the books of the corporation debtor—municipal or private—as the registered owner, or, if it be a government bond, on the register of the government. On the days when, by the terms of the bond or certificate of indebtedness, the interest falls due, it is paid directly to the registered creditor, without presentation of the bond,—usually by check drawn to his order and sent by mail, or, if he so demands, by cash in hand; but, by long-settled course of practice, the payment is made by check to the order of the creditor. These bonds or certificates of indebtedness are not negotiable, and can be transferred only by an entry on the books of the debtor corporation, with a proper indorsement on the bond itself, or by the issue of a new certificate, if it be a government indebtedness. The peculiar value of this class of securities lies in the fact that it is not necessary to produce them to the debtor at each time that the interest is due, and the danger of loss by robbery or fire is entirely removed.”

This case is also authority for the rule that the proper remedy to enforce the conversion of a “convertible coupon bond” into a “registered bond” is specific performance.

**§ 77. Definition and Effect of “Countersigning.”** The term “countersigning” as applied to certificates of stock has been defined by the New York Court of Appeals<sup>14</sup> as follows:

“To countersign an instrument is to sign what has already been signed by a superior, to authenticate by an

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14. *Fifth Avenue Bank v. Forty-second St., etc., Co.* (1893), 137 N. Y. 231; 33 N. E. 378, 19 L. R. A. 331, 33 Am. St. Rep. 712.



additional signature, and usually has reference to the signature of a subordinate in addition to that of his superior by way of authentication of the execution of the writing to which it is affixed, and it denotes the complete execution of the paper.”

The effect of countersigning the Court in this case said was to declare “in the most formal manner that it (the stock certificate in question) had been properly executed by the defendant (in this case the principal, and not the countersigning agent) and that every essential requirement of the law and of the by-laws had been performed to make it the binding act of the company.”

**§ 78. Right of Corporation to place Restrictions upon Transfer and Issue of its Stock Incident to Services of a Countersigning Agent.** A Pennsylvania opinion<sup>15</sup> considered the effect of statutory requirements relating to signatures upon certificates of stock and implied rights of the corporation to protect these signatures. The Court said:

“The Act of June 24th, 1895, P. L. 258, provides that any stockholder of a corporation shall be entitled to receive a certificate of the number of shares standing to his credit on the books, ‘which certificate shall be signed by the president or vice-president or other officer designated by the board of directors, countersigned by the treasurer, and sealed with the common seal of the corporation.’ This, however, does not prevent the corporation, if it is willing to give such certificates, from taking such further precautions as it sees fit to provide against the simulation of such signatures; and if a party who receives a certificate signed and sealed as provided by the act of assembly is, at the same time, given express notice

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15. Dollar Savings Fund and Trust Co. v. Pittsburgh Plate Glass Co. (1906), 213 Pa. St. 307, 62 Atl. 916, 5 Am. & Eng. Anno. Cas. 248.

that the certificate is not good and will not be recognized as a certificate until it has another signature, such party cannot then pay money for such stock and claim that the company is in equity estopped to deny the validity of the certificate, and bound to recognize the party as a stockholder or to pay him damages, if the certificate was in fact fraudulently or improperly issued."

**§ 79. Liability of Companies for Acts of their Agents, Registrars, etc.** There are a number of cases, in which the liability of corporations for the acts or omissions of their own transfer agents, registrars and the like have been considered. An inquiry in regard to these, however, is not deemed of importance here, because my purpose is to treat of agency of this kind as of and in itself the business of an independent company, which it sets itself up to perform as the agent of whomsoever applies to it. As holding itself out for such purpose and for a consideration of reward for its services it might place its principal or customer in some attitude of responsibility to one misled by its errors, frauds or mistakes, but at the same time just as with any other agent, it would incur a liability to its principal or customer. The phrase "transfer agent" seems a little misleading. It is rather *nomen generalissimum*. The company really is no more an agent than any one else is an agent. It is merely open for employment in a particular kind of work, and represents itself as competent to perform that work.

That a trust company in business as a transfer agent, or "registrar of transfers" may involve liability of one of its corporate customers, appears, by way of argument, in a recent case.<sup>16</sup> In this case there was a

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16. Dollar Savings Fund & Trust Co. v. Pittsburgh Plate Glass Co. (1906), 213 Pa. 307, 62 Atl. 916, 5 Am. & Eng. Anno. Cas. 248.

suit against the Pittsburgh Plate Glass Company for negligent issue of a stock certificate. It was properly signed by the president and secretary, and it was left where a clerk had access to it. Under the signatures of the president and secretary, and above the seal, was the following: "This certificate will not be valid unless countersigned by the Union Trust Company of Pittsburgh, registrar of transfers." The clerk forged the name of Mr. Carr, the proper officer of the Union Trust Company. The court, in ruling in defendant's favor, said: "If the certificate had been signed by the president and secretary, and sealed and left with Carr, and he had signed it without authority, and issued it fraudulently, the company would doubtless be bound to recognize its validity, or if (the clerk) had obtained Carr's genuine signature, the result would be the same."

A New York case<sup>17</sup> is seemingly more explicit on this point, though the precise question of civil liability for the acts of an agent was not involved. Speaking of the point of whether a foreign corporation maintaining a transfer agent in the state has an office therein for the transaction of business, it was said: "There is no magic in the fact that the agent employed is (another) corporation; it might have been an individual, or it might have been an ordinary salaried employee designated as the transfer agent, and certainly, if that were the case, the acts of the agent within the scope of his authority would be the acts of the principal." On the precise point involved, viz: whether the employing of another corporation as a transfer agent constituted the transaction of business within the state subsequent decision is the other

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17. *People ex rel. Singer v. Knickerbocker Trust Co.* (1902), 77 N. Y. Supp. 1000, 38 Misc. (N. Y.) 446.

way,<sup>18</sup> though it appears that it gives the corporation a domicile in the foreign state "so far as the registry and transfer of shares therein are concerned."<sup>19</sup>

**§ 80. Liability of Trust Companies as Transfer Agents.** The liability of a trust company as transfer agent where there was a forged assignment was declared in a New York case.<sup>20</sup>

This was an action by the certificate holder directly against the trust company, which was a party to terminating the affairs of one corporation by exchanging its certificates for those in a new company, the trust company to receive the old certificates and to see that the holders received stock in the new company. Nothing was said as to the rights of the certificate holder against the old or the new company, but liability is declared against the trust company for the unauthorized transfer and this embraces the right of the new holders to be recognized.

In a later New York Court of Appeals Case<sup>21</sup> an opinion concurred in by six of the seven members of the court, Gray J. dissenting, holds a trust company, as transfer agent, to an exceedingly strict liability. This agency was created to enable an English company to sell a limited number of its shares in this country. As the majority opinion says: "The defendant (trust company) was the central figure in a plan to make shares issued by an English corporation readily marketable in this country. For that purpose it issued the certificates

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18. *Althouse v. Guaranty Trust Co.* (1912), 137 N. Y. Supp. 945, 78 Misc. (N. Y.) 181; *Wadsworth v. Equitable Trust Co.* (1912), 138 N. Y. Supp. 842, 153 N. Y. App. Div. 737.

19. See Sec. 89 of this book, *infra*.

20. *Weichers v. Central Trust Co.* (1894), 80 Hun. 576.

21. *McClure v. Central Trust Co.* (1900), 165 N. Y. 108, 58 N. E. 777, 53 L. R. A. 153.

of transfer and accepted the position of agent to transfer certificates in consideration of an annual salary. It held out the shares in its possession for sale as marketable. The acts of certifying, offering for sale and selling were in substance an assertion to that effect. Its position was one of trust, and invited the confidence of the public. What a trust company sells even for a third person, under such circumstances, the purchaser may reasonably expect to receive in essence and substance, and not its mere shadow. It held the shares and the deed of transfer in trust for purchasers, and expressly agreed to make delivery upon demand. It was to deliver something which it knew purchasers would expect, and which of necessity it must itself have expected, would result in the transfer of marketable shares. The position which it occupied and the circumstances surrounding it when it contracted with the plaintiff cast upon it the duty of exercising due care in discharging the trust relation which it had assumed. It knew, but the plaintiff did not know, that the shares were issued by the English company subject in express terms to its articles of association and regulations; that the deed of transfer was likewise subject to the several conditions on which the transferrer held shares 'immediately before the execution' thereof, and that it also contained a covenant on the part of the transferee 'to accept and take the said shares subject to the conditions aforesaid.' "

Here the question naturally is suggested whether proposed purchasers were under obligation to inquire back of the offer by the trust company to transfer. But what says the Court as to this? "Under these circumstances the law *imputed to the defendant*<sup>22</sup> the duty of

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22. Italics supplied.



inquiring to see whether there was anything behind the conditions appearing on the face of the papers in its possession, which would make the shares unmarketable, *before* it undertook to place them on the market under the sanction of its name and the confidence invited by its standing. Its position and superior knowledge put it upon inquiry and the law charges it with knowing whatever proper inquiry at the proper place would have disclosed."

There is much of mingling in this case of the specific duty of a transfer agency with that of the agency holding itself out as a seller of the stock, but the dissenting opinion shows that the dissenting judge understood the ruling as defining the responsibility of a transfer agent pure and simple. Thus he said: "I not only doubt the soundness of the doctrine upon which it is sought to impute to the trust company a liability akin to that which it would be under as a vendor; but I doubt its wisdom. The trust company is one of a number of like institutions, which afford the community safe and convenient agencies in financial transactions of magnitude where responsibility for the safety of values confided to them, as well as a complete and effective machinery, are demanded. It is sought to impute to this trust company duties and liabilities which its conduct did not suggest and which were not within the strict terms of its undertaking."

This case has been cited in later New York cases to the proposition that the trust company was liable as the agent of an undisclosed principal,<sup>23</sup> and therefore where a trust company became the trustee under a trust mortgage which provided that the trustee should not be

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23. *Tschetnian v. City Trust Co.* (1904), 97 N. Y. App. Div. 380.



responsible for any default by the mortgagor and each of the bonds secured thereby were merely indorsed by the trustee as being one of a series mentioned in the mortgage referred to by the bonds, on their face, the court said: "Prospective purchasers \* \* \* were fairly referred to the mortgage," etc. Besides the sales were by the mortgagors. It was further said: "In view of the length of time during which it has been the custom of trustees of bond issues to act in that capacity for a comparatively trifling consideration limiting their liability to their own acts of negligence, without so far as appears a single adjudication extending the liability to even the implied guaranty of the securities whose mere identity they have authenticated, it would be unfair in the circumstances detailed in the complaint to impose so serious a burden upon the office assumed by the defendant in the financial transaction in question."

In this case there is something resembling a transfer agency, or at least that of a registrar, but both it and the Central Trust case to which it refers inculcate the doctrine, that to the extent a trust company may, as a transfer agency or a registrar, be fairly supposed to represent that stock or bonds are marketable, to that extent it should be held responsible.

### § 81. Liability as Transfer Agent Continued.

It seems to me a little difficult to reconcile *Wiechers v. Central Trust Co.* and *McClure v. Central Trust Co.* *supra* with a later decision by the New York Supreme Court, Appellate Division,<sup>24</sup> affirmed by the New York Court of Appeals, without opinion.<sup>25</sup>

24. *Dunham v. City Trust Co.* (1906), 115 N. Y. App. Div. 584, 101 N. Y. Supp. 87.

25. (1908) 193 N. Y. 642.

In the Dunham case there was a suit against a trust company as transfer agent for refusing to transfer stock of a foreign corporation for the reason that it was waiting a ruling by the State Comptroller whether or not it was subject to taxation. In the meantime the stock was sold at a loss. For this loss the the trust company was sued.

The court held relying on a former decision that the action did not lie, saying: "In *Denny v. Manhattan Co.* (2 Den. 115.) the resident transfer agent of a foreign corporation unjustly refused a transfer, and the plaintiffs brought action on the case. The court held that the action did not lie against the defendant, as it was not the agent of the plaintiffs and owed them no duty, but the agent of the defendant to whom alone it was answerable for any neglect in discharge of the agency. The judgment was affirmed in the Court of Errors, the chancellor and two of the senators delivering 'written opinions in favor of affirming the judgment of the Supreme Court upon the ground upon which its decision was made' (5 Den. 639.) In *Colvin v. Holbrook* (2 N. Y. 129) the Court says: 'The question must be deemed at rest in this state by the decision in *Denny v. Manhattan Co.* and (2 Denio 118) affirmed in the court for the correction of errors.' (See, too, *Montgomery County Bank v. Albany City*, 7 N. Y. 459 and *1 Morawetz Corp.* (2nd ed.) 537 citing *Denny's Case supra*)" Neither in the *Wiechers* nor the *McClure* case were the cases above cited referred to, though they preceded both of them, and yet both of them concerned transfer agents of foreign corporations. Probably the essential reason of the decisions in those cases rested on the express agreements on the part of the transfer agent. But, as I have shown, Judge Gray, who dissented in the *McClure* case, regarded the judg-

ment against the trust company as against it as a transfer agent subject directly to an action brought by a shareholder.

There is nothing, however, in the Dunham case that intimates that the trust company would not be liable to the corporation for any loss that might be recovered by Dunham in an action against it. If it would be, it becomes apparent, as I have stated *supra*, that the words I have quoted from *Bank of Kentucky v. Schuylkill Bank supra*, inadequately portray the responsibility of a transfer agent.

The Denny case, however, was against a bank in New York, which was a transfer agent according to the usage described in *Bank of Kentucky v. Schuylkill Bank, supra*, and not against a trust company empowered by statute to carry on business as a transfer agent. Nevertheless the rule there announced is applied to such a company as a transfer agent in the Dunham case. It seemed, however, to be conceded that could the act of the transfer agent have been deemed a misfeasance, and not a mere nonfeasance, it would have been held liable.

**§ 82. Liability as Transfer Agent—Concluded.** Whether a trust company as a transfer agent may incur a direct liability to the shareholder of a corporation for which it acts as transfer agent appears to me to be involved in doubt. The old distinction between acts of misfeasance and nonfeasance on the part of an agent has been spoken of as the "now exploded distinction."<sup>26</sup> But it would not seem unjust to revive it against a corporation with express powers under statute to carry on a particular business, even should the corporation not be held, as an agent, for acts of nonfeasance as well.

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26. Wharton's Agency, Sec. 537.

It does not seem to me so very clear that such a corporation holding itself out to the world as competent to carry on the business of a transfer agency should be regarded as the mere agent of the corporation that employs it. The policy of the law that vests it with such powers is to make it responsible to whomsoever its acts, whether of omission or commission, affect. Its selection as such an agency, just as is stated in the McClure case, involves a duty "under the sanction of its name and the confidence invited by its standing"—a justification of the law's policy.

Furthermore as its employment, especially by a foreign corporation, at favored centers will be judicially noticed to be for the benefit of shareholders fully as much as for the corporation itself, courts will impose on it an implied obligation to them along with the express obligation to it.

**§ 83. Liability as "Registrar" of Stock.** What, if any, distinction there may be between the liability of a registrar of stock and the liability of a transfer agent has not yet appeared in judicial decision. Henry J. Bowdoin, of the Maryland Trust Company, has stated<sup>27</sup> that in his opinion the duties and liability of a registrar do not differ in any marked degree from those of a transfer agent, that "in guarding against an over-issue of stock, it becomes necessary for the registrar to scrutinize all transfers since the issue of a certificate, except against one, legally cancelled, for the same number of shares would necessarily result in an over-issue. This duty the registrar impliedly, by its acceptance of the office and fee agrees to discharge. Obviously, if the registrar cer-

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27. Address, Proceedings, American Banking Association, 1900.

tifies the issuance of a certificate, thereby placing upon it the last and highest *indicia* of validity, and loss results to the principal therefrom, the registrar has failed to fulfill the purpose of its appointment; if, by such action, loss enures to a stockholder whose property rights have been wrongfully divested thereby, cannot such stockholder recover from the registrar, the signature of the latter in acceptance and approval of the evidences of the transfer being essential to the transfer and being the last act in consummation of the transaction by which the stockholder is injured?"

This responsibility of a registrar was expressed by Mr. Jordan J. Rollins as follows:<sup>28</sup>

"While the officers of some companies which act as registrars undoubtedly believe that the responsibilities connected with the discharge of the office are not as great as are those of a transfer agent, that opinion is probably not generally held. According to the practice in New York, at least, a registrar seldom requires more than the exhibition of a cancelled certificate of stock for a given number of shares, and the presentation therewith, either by the issuing corporation or by its transfer agent, of a new certificate for the same number of shares in the name of the transferee of the cancelled certificate. Thereupon the registrar signs the new certificate without requiring other evidence of the correctness of the transfer. Now, if, as a fact, the transfer agent has been induced to cancel the old certificate and to issue the new by a forged or otherwise invalid transfer, the stock does not follow the new certificate. In other words, the new certificate represents no stock. The counter-signature

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<sup>28</sup>. Address on "The Protection of Trust Companies Acting as Transfer Agents and Registrars" before the Trust Company Section, American Bankers' Association, Sept. 14, 1905.



of the registrar, which, in effect, certifies to the public that the certificate upon which it appears does not represent an over-issue, would, therefore, in such case be false and might be held to constitute grounds for a suit for damages.”

**§ 84. Importance of Terms Used by Trust Company in Describing its Capacity—Contracts in Limitation of Liability.** The foregoing definitions and cases show the extent of the liability assumed as dependent upon acting as “a transfer agent” a “registrar of transfers,” a “registrar” or a “countersigning agent.” A trust company must use these terms with discrimination or it will assume responsibilities not contemplated. A magazine article<sup>29</sup> speaks of some of these terms and fearing the obligations they imply, advises that: “The most obvious remedy is to change the vital word, using one which means less, and in this regard we probably cannot do better than follow the English example, and adopt the word ‘entered.’ On its face this means merely that the transaction has been noted on the books, and guarantees nothing as to the signatures of the corporation officials.”

The liability of a transfer agent and registrar to the public, i. e., to transferors and transferees of stock, so far as such liability exists, cannot be directly affected by the terms of the agreement between the corporation and the agent, to which they are not parties. This contract, however, may, in the absence of gross negligence or fraud, fix the liability of the agent to the corporation, and, it is submitted, in such a way as to permit recovery by the agent against the principal, where the agent has been compelled to make payment with respect to an un-

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29. 10 Case and Comment (1903) 73, by Charles A. Greene of New York City.



authorized or illegal transfer; except, as stated, where the agent has been guilty of fraud or gross negligence.

A reasonable provision in such a contract would be the terms of the Vermont statute on the liability of transfer agents. (Chap. 150 Acts of Vermont, 1915). This statute provides that the liability of a transfer agent shall be "only to act in good faith and with reasonable care and skill so as not to register any securities which are in excess of the amount authorized to be issued by the issuing corporation; or to transfer any securities to which the transferee is not entitled."

This may or may not be the true measure of a transfer agent or registrar's liability to its principal without a special clause in the contract to that effect. In the absence of decisions in point, it is at least a proper precaution against excessive liability.

A far more radical provision for protection of the agent is mentioned by Charles A. Greene of New York, in 10 *Case and Comment* (1903) 73. He says that "The best method hit upon for protecting the agent in such case is by way of special clauses in the contract of agency." He then quotes the following as being clauses of this nature:

"In case any question shall arise, or any doubt shall exist, on the part of the agent, as to the propriety, regularity, legality, or otherwise of the proposed transfers, or any matter connected therewith, whether of prior indorsement, title, or otherwise, then and in such case the agent reserves the right to refer such questions to your company for instructions."

"The agent assumes no responsibility or liability for the regularity, legality, or genuineness of any indorsement on certification of stock, or otherwise, or for the

signatures purporting to be signed by or on behalf of any stockholders, officer, or agent, or other person or persons, or by any party in a representative capacity, nor for the regularity, validity, or propriety of any instrument of transfer or of title. Neither does the agent assume any responsibility for, or liability by reason of, any unauthorized issue of stock; nor shall it be assumed to guarantee, represent, or be in anywise responsible for, nor shall it be so responsible for, the validity, legality, or regularity of the stock now or hereafter issued by your company, or any assignment or transfer thereof."

The clause in an agency contract is but an indirect protection, for if the agent has been held liable on an implied obligation to the public, it must bring an action against its principal for indemnity and is put to the delay of litigation and the possibility of having an uncollectible claim against an insolvent corporation. As a practical matter, however, it has been pointed out, that only stock of responsible concerns are dealt in to any great extent and the risk of mistake and consequent liability is in direct ratio to the number of transfers.

A more recent suggestion is made by F. Winchester Dennio (*Trust Companies Magazine* for September, 1915, p. 209-210). He proposes that the following provision be inserted in all stock certificates:

"This certificate is not valid until countersigned and registered by the agents of the company for transfer and registration and the holder hereof and his representatives and assigns by the acceptance hereof agree that the said agents shall have no liability to them in connection with the issue, transfer and registration hereof, if acting in good faith and with reasonable care."

§ 85. Precautionary Requirements and Rules as

**Protection against Improper Transfers.** Several transfer agents and their counsel after careful consideration, made a report in 1912 of proper precautionary requirements preceding transfers by executors, administrators, trustees, guardians and life tenants. This report is set forth in the appendix of this book<sup>31</sup> together with general precautionary rules and suggestions for the issue and transfer of stock. Compliance with these rules affords protection to transfer agents, as well as to security holders and the corporations represented.

**§ 86. Liability as Affected by Sub-Agency of Employees.** The liability of an incorporated transfer agent is not affected by the fact that duties are performed by employees who are themselves agents of the agency. Argument on this point was thus disposed of in the Kentucky Bank Case:<sup>32</sup>

“First, it is contended, that the contract for this agency being made by the president and directors of an incorporated bank, it became, from a necessity, equally known to both parties, requisite to employ the assistance of sub-agents in its execution. That the cashier of the Schuylkill Bank was the sub-agent, so chosen by that corporation with the assent and approbation of the complainants; that all the frauds charged in the bill were perpetrated by him without the connivance of the President or Director of the bank; and that under such circumstances the bank is no farther responsible for his acts than arises from the general obligation of every principal agent to act with good faith and ordinary care in the selection of a secondary agent. The principle on

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31. Appendix, page 500.

32. *Bank of Kentucky v. Schuylkill Bank* (1846), 1 Pars. Eq. Cas. (Pa.) 180, 239.

which this position rests, is the familiar one, that when it is usual and necessary for a principal agent to employ a sub-agent, as for example, a broker or an auctioneer, to transact the business, in such a case, the principal agent will not ordinarily be responsible for the negligence or misconduct of the sub-agent, if he has used reasonable diligence in his choice as to the skill and ability of the sub-agent. But, indisputable as is this principle, it has no relevancy to an agency like the present. The cashier of a bank, while carrying into execution, under the orders of the directors, a lawful contract, such as the contract creating this agency is shown to have been, is in no sense of the word a sub-agent of the board of directors. He is a statute officer, not of the directory, but of the corporation lawfully empowered to carry the contracts of the corporation into execution, as the directors are lawfully authorized to make them, when acting within the sphere of their authority derived from the corporation."

**§ 87. Printing of Fiduciary's Name on Instruments Does not Constitute Signature until Blank for Signature of Officer is Filled.** For convenience the name of the company acting as registrar, transfer or countersigning agent is generally printed upon stock certificates and bonds. The regularity and safety of this practice is upheld in a case<sup>33</sup> wherein a corporation was sued for negligent issue of a stock certificate. It was alleged that the signature of James S. Carr, an officer of the countersigning trust company, was forged. In the course of its opinion the Court said:

"We cannot fall in with plaintiff's contention that the name, 'The Union Trust Company of Pittsburgh,' printed in the forms with a blank for the signature of the

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33. Dollar Savings Fund & Trust Co. v. Pittsburgh Plate Glass Co. (1906), 213 Pa. St. 307, 62 Atl. 916, 5 Am. & Eng. Anno. Cas. 248.

proper officer, is a signature by the trust company without having the blank filled. We take it that the necessity for the signature of some officer is well known in such cases, and plaintiff certainly never looked upon the Carr signature as surplusage."

§ 88. **Inspection of Books of Transfer Agents—Mandamus and Penalties.** Before amendment in 1916, Sections 32 and 33 of the Stock Corporation Law of New York were frequently applied to secure lists of stockholders and their addresses from the transfer agents. Compliance with the law was often resisted because the motive of the application was unfriendly to the principal corporation or because the list was desired for advertising purposes. The amendment<sup>33½</sup> provides that: "It shall be a defense to any action for penalties under this section that the person suing therefor has within two years sold or offered for sale any list of stockholders of such corporation, or any other corporation or has aided or abetted any person in procuring any stock list for any such person."

Criminal liability is provided by Sec. 665 of the New York Penal Code, wherein it is made a misdemeanor for "A director, officer, *agent* or employer of any corporation or joint-stock association who: \* \* \* having the custody or control of its books, willfully refuses or neglects to make any proper entry in the stock book of such corporation as required by law, or to exhibit or allow the same to be inspected, and extracts to be taken therefrom by any person entitled by law to inspect the same, or take extracts therefrom."

Right of mandamus to enforce inspection of books and papers in the hands of transfer agents, where the

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<sup>33½</sup>. Laws of 1916, Chapter 127.



principal corporation has some other business office in the state or is otherwise doing business therein is clear and unquestioned,<sup>34</sup> but where the foreign corporation merely has a transfer agent, this relief was denied by the majority in a lower court.<sup>35</sup> The dissenting Judge relied, in part, upon an earlier case.<sup>36</sup>

A recent decision of the Appellate Division (First Department), in an action to recover the \$250.00 penalty, also denied relief because the maintenance by a corporation "of a transfer office in New York City was for the convenience of stockholders and facilitated the sale of its stock, but did not constitute 'doing business' or the 'transaction of business'<sup>37</sup> within the meaning of the statute." The penalty cannot be avoided because the books demanded do not contain "every particular item required by the statute."<sup>38</sup>

In this case the Judge would include registrars within the same rules. He said: (p. 451.)

"I have had in my remarks upon this subject of the books, particular reference to the Knickerbocker Trust Company (transfer agent), but I am of opinion that if the books kept by the other trust company (Atlantic Trust Company, registrar) contain similar information, they come within the same category."

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34. *People ex rel. Singer v. Knickerbocker Trust Co.* (1902), 38 Misc. 416, 77 N. Y. Supp. 1000.

35. *Althouse v. Guaranty Trust Co.* (1912), 78 Misc. (N. Y.) 181, 137 N. Y. Supp. 945.

36. *Miles v. Montreal Copper Co.* (1903), 40 Misc. (N. Y.) 282, 81 N. Y. Supp. 974.

37. *Wadsworth v. Equitable Trust Co.* (1912), 153 N. Y. App. Div. 737, 138 N. Y. Supp. 842.

38. *Tyng v. Corporation Trust Co.* (1905), 104 N. Y. App. Div. 486, 93 N. Y. Supp. 928.



§ 89. Where Cause of Action Arises with reference to Transfers by Transfer Agent. That a cause of action arises in the state where a transfer agent improperly transfers stock, was held in *Toronto Trust Co. v. C. B. & Q. R. R. Co.*<sup>39</sup>

The plaintiff was a corporation under the laws of Ontario, Canada. As successor trustee it sued the railroad to recover shares of stock, (with dividends), that had been transferred without authority by its predecessor trustee, and which, it alleged, the defendant and its transfer agent, the National Bank of Commerce in New York, knew the predecessor trustee had no power to transfer. Summons was served upon one of the officers of the railroad, also a foreign corporation, in New York. Motion to set aside the service was denied, because the cause of action arose in New York and therefore the New York courts had jurisdiction.

In *Lockwood v. U. S. Steel Corporation*,<sup>40</sup> it was held that an ancillary executor of a non-resident, could compel the transfer of shares at the New York transfer office of a New Jersey corporation. The court said:

“The proposition for which the defendant contends is that shares of stock have their *situs* only in two possible places—either at the domicile of the corporation or at the domicile of the stockholder. In the present case, however, it is alleged in the complaint, and necessarily admitted by the demurrer, that the defendant maintains in the county and city of New York, an office for the purpose of receiving certificates of its corporate stock for transfer upon its books and of delivering new certificates

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39. (1884) 32 Hun. (N. Y.) 190.

40. (1913) 209 N. Y. 375, reversing 153 N. Y. App. Div. 655. See, also, 218 N. Y. Mem. 12.

when such transfers have been made. Does not this fact constitute New York the domicile of the corporation, to some extent at least—so far as the registry and transfer of shares therein are concerned? We think it does.”

## CHAPTER XIV

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### Trust Companies as Depositories—Safe Deposit Companies

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§ 90. Preliminary. Trust companies generally have a banking feature and a trust feature, and under statutes, of many states they may act as "bailees" for hire. Thus the Missouri statute<sup>1</sup> authorizes them "to receive upon deposit for safe-keeping personal property of every description; to guarantee special deposits and to own or control a safety vault and rent the boxes therein," and to become a "depository." These functions import merely a common law liability, as to which no preference is given out of general assets or any lien upon a special fund, according to the usual phraseology of trust company statutes, nor is the vesting of power in a trust company to carry on this kind of business operative in any exclusive way to its being conferred on other corporation, for example, a safe deposit company, which would not be a trust company or have any power to carry on a banking business.

§ 91. A Trust Company as Depository. The distinction between a depository and a depository appears to consist mainly in the fact, that the former is

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1. R. S. Mo. 1909, Sec. 1124.

a public agency,<sup>2</sup> while the latter arises in an ordinary contract of bailment, the bailor of a thing being also called depositor and the bailee thereof the depositary. We find this distinction in some statutory phraseology.<sup>3</sup>

In the sense that depositaries are public agencies, and not strictly public officers, many statutes utilize corporations, especially banks and trust companies, for the deposit of public funds. In the sense that a depositary is not a trustee, the latter is vested with title and active management of the *res*, while the former has merely custody and care, with a possible or contemplated right of user.<sup>4</sup> The liabilities, duties and degree of care obligatory on depositories and depositaries depend on various considerations not necessary here to be considered. These depend, however, on statutes and inferences therefrom or upon the nature of transactions from a contractual point of view.

A trust company is recognized as a banking institution under the general words of the bankruptcy statute, section 61, which provides for courts of bankruptcy designating "banking institutions as depositories for the money of bankrupt estates." This section required courts to exact from such banking institutions, bonds for the safe-keeping (of such moneys) (by the depositories), and in New York an interesting question arose whether or not the liability of a trust company depository was as a banking institution pure and simple, or under

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2. Colquitt v. Simpson (1884), 72 Ga. 501.

3. S. D. Civ. Code 1903, Sec. 1353; Okla. R. S. 1903, Sec. 2825; N. D. Rev. Code 1899, Sec. 4001.

4. Thompson v. Whitaker Iron Co. (1895), 141 W. Va. 574, 23 S. E. 795; Roberts v. Stuyvesant Safe Dep. Co. (1890), 123 N. Y. 57, 25 N. E. 294, 9 L. R. A. 38, Am. Neg. Cas. 535.

the preference clause in trust company laws.<sup>6</sup> The Court of Appeals held that the trust company statute was a state law not intended to include as trust funds deposits by Federal Courts in the banking department of a trust company, especially as the bankruptcy statute provided for the judges exacting a bond for their safe-keeping.

In Missouri, and this state is taken merely as illustrative, the statute speaks of depositories, as "approved banks or banking institutions,<sup>7</sup> banking corporation, association or individual banker,"<sup>8</sup> "a bank or banks, trust company or trust companies,"<sup>9</sup> all showing equally as broad language as in the bankruptcy statute, *supra*, which as seen includes trust companies. From the Morris case it also appears that the trust company therein referred to must have been designated by the state comptroller as a depository for court funds, at least, or it would not have been selected by the federal court as a depository, in bankruptcy matters. The Minnesota statute provided only for the designation of any national, state or private bank, and a trust company was designated.<sup>10</sup>

The fact, therefore, appears that as a banking institution a trust company may be selected as a depository for public funds and stand to them as such, while as to court funds it stands as a trustee. Of course, all of this is dependent upon the particular language of statutes. It may be thought, also, that when a statute makes the

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5. *Henkel v. Carnegie Trust Co.* (1914), 213 N. Y. 185, 107 N. E. 346, reversing 154 N. Y. App. Div. 596, 139 N. Y. Supp. 969.

7. R. S. Mo. 1909, Sec. 11880.

8. *Ibid.*, Sec. 9217.

9. *Ibid.*, Sec. 9858.

10. *Board of County Commrs. v. Am. Loan & Trust Co.* (1897), 67 Minn. 112, 69 N. W. 704.

company a trustee, or liable as such, it may be termed a depository, and when a governmental agency, and not a trustee, nor liable as such, it is a depository. Frequently, however, statute uses the word depository not in a distinguishing sense at all as, for example, see cases cited.<sup>11</sup> As to funds placed with a depository the relation arising is that of a debtor and creditor.<sup>12</sup> When an institution is the repository of public or private funds, under court orders or decrees, claimants thereof cannot hold the public liable for their loss.<sup>13</sup>

**§ 92 Liability of Officer for Loss of Funds in Depository.** It appears to be true, that, unless a banking institution is designated as a depository for public funds,<sup>14</sup> an officer exercising his own discretion in the selection of a depository will be liable for their loss,<sup>15</sup> and this though the public authorities have provided no safe place for their keeping,<sup>16</sup> and the officer was merely following a long prevailing custom.<sup>17</sup> The

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11. *Brown v. Wyandotte Co.* (1897), 58 Kan. 672, 674, 50 Pac. 888; *Board of Commrs. of St. Louis County v. Security Bank* (1899), 75 Minn. 174, 180, 77 N. W. 815; *Colquitt v. Simpson*, *supra*.

12. *Marx v. Parker* (1894), 9 Wash. 473, 37 Pac. 675, 43 Am. St. Rep. 849; *U. S. v. Thomas* (1873), 15 Wall. 337, 21 L. Ed. 89; *Contra State v. Foster* (1895), 5 Wyo. 199, 213, 38 Pac. 926, 63 Am. St. Rep. 47, 29 L. R. A. 226.

13. *Condert v. U. S.* (1899), 175 U. S. 178, 44 L. Ed. 122 affirming 73 Fed. 305, 19 C. C. A. 543; *Branch v. U. S.* (1880), 100 U. S. 673, 25 L. Ed. 759.

14. *Holt County v. Cronin* (1907), 79 Neb. 424, 112 N. W. 561.

15. *Wilson v. Wichita County* (1887), 67 Tex. 647, 4 S. W. 67; *Fairchild v. Hedges* (1896), 14 Wash. 117, 44 Pac. 125, 31 L. R. A. 851; *Com. v. Bailey* (1887), 129 Pa. St. 480, 10 Atl. 764.

16. *Lowry v. Polk County* (1879) 51 Iowa 50, 49 N. W. 1049, 33 Am. Rep. 114; *Griffin v. Mississippi Levee Commrs.* (1894), 71 Miss. 767, 15 So. 107.

17. *County of Mecklenburg v. Beales* (1911), 111 Va. 691, 69 S. E. 1032, 36 L. R. A. (N. S.), 285.



good faith of the officer is held to constitute no defense, because the terms of his bond make him in effect an insurer for the safe keeping of public funds,<sup>18</sup> but bonds may be so conditioned under statute, as to make this liability less stringent, and constitute the officer as little more than a bailee, bound to the exercise only of reasonable prudence in selecting a depository.<sup>19</sup> If an officer, however, instead of making a deposit as such, places it to his account on general deposit, this has been held, even where he would not be held as an insurer, to make him liable for a bank's failure, notwithstanding his prudence and good faith.<sup>20</sup>

**§ 93. Liability of Officer Depositing Private Funds.** Various officers of court receive money *virtute officii* and if the court or some other tribunal or official is duly authorized to select depositories and do so and the statute not only authorizes but directs its deposit therein, it must be thought that such officers come under the same rule as those officers who deposit public funds in such depositories. And this would seem to be true especially under a rule which holds such court officers to a less stringent rule than that applied in the deposit of public funds. There is no rule, I believe, that holds them to a more stringent liability.

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18. *U. S. v. Prescott* (1845), 3 How. 578, 11 L. Ed. 734; *Tillinghast v. Merrill* (1896), 151 N. Y. 135, 45 N. E. 375, 34 L. R. A. 678, 56 Am. St. Rep. 612; *Cicero* (1902), 63 Neb. 777, 89 N. W. 389, 57 L. R. A. 303; *Cameron v. Hicks* (1909), 65 W. Va. 484, 64 S. E. 832, 17 Ann. Cas. 926.

19. *Livingston v. Woods* (1897), 20 Mont. 91, 49 Pac. 437; *Overton County v. Copeland* (1896), 96 Tenn. 296, 34 S. W. 427, 31 L. R. A. 844, 54 Am. St. Rep. 840; *Fentress County v. Reed* (1906), 116 Tenn. 110, 95 S. W. 809, 7 L. R. A. (N. S.) 1084.

20. *Alston v. State* (1891), 92 Ala. 124, 9 So. 732, 13 L. R. A. 659; *Montgomery County v. Cochran* (1903), 121 Fed. 17, 57 C. C. A. 266.

The rule as to officers of court has been laid down by Justice Story as follows: "In respect to property in the custody of the officers of a court, pending process and proceedings, such officers are undoubtedly responsible for good faith and reasonable diligence. If the property is lost or injured by any negligent or dishonest execution of the trust they are liable in damages. \* \* \* The degree of diligence which officers of the court are bound to exert in the custody of the property seems to be such ordinary diligence as belongs to a prudent and honest discharge of their duties, and such as is required of all persons who receive compensation for their services."<sup>21</sup> This principle was applied in a Colorado case,<sup>22</sup> where the clerk of a court deposited funds arising out of a condemnation case in a bank of reputed solvency. It was said the clerk acted as prudent men ordinarily do with their own funds." The deposit was made by him as clerk and the bank had notice the money was held by him in his official capacity.

And in New York,<sup>23</sup> the distinction between an officer holding *virtute officii*, private moneys and one holding public moneys was alluded to as follows: "It does not follow because public policy requires that public officers who receive public money should be held to a rigid responsibility, that the same rule should be applied to public officers who receive the money of individuals, who are stimulated by private interests to some watchfulness over the conduct of the officials, and to some scrutiny as to the custody of their funds." The

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21. Story, Bailm. Sec. 620.

22. *Wilson v. People* (1893), 19 Colo. 199, 34 Pac. 944, 22 L. R. A. 449, 41 Am. St. Rep. 243.

23. *People ex. rel. v. Faulkner* (1887), 107 N. Y. 477, 487, 14 N. F. 415. See also *Fairchild v. Hedges* (1896), 14 Wash. 117, 44 Pac. 125

bond in this case was for the faithful performance of his duties and the faithful application and payment of all moneys that may come into his hands. This was said not to enlarge his common law liability. The deposit in this case was with an individual banker in good standing and credit and the officer and his bond were held exonerated.

The distinction ruled in these two cases has been denied in a Minnesota case,<sup>24</sup> where private funds were deposited without a court order. There was a vigorous dissent by one judge, and the prevailing opinion went upon what it said was the established rule in Minnesota.<sup>25</sup>

**§ 94. Depositaries as Gratuitous Bailees.** I need not greatly discuss the question of the liability of banks and banking institutions for special deposits received by them where their charters, or the laws under which they are organized, contain no reference to such deposits. In such case, if the deposit is made to a gratuitous bailee and it is lost by its gross negligence, such negligence, especially, if it arises out of customary practice in the doing of business by such bailee, is equivalent to the commission of a tort excluding the right to interpose a plea of *ultra vires*. This was ruled in a case by our Supreme Court in regard to a national bank receiving for safe-keeping for one of its customers, public securities of the United States,<sup>26</sup> which ruling was adhered to in a later case.<sup>27</sup> The same principle was applied in

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24. Northern Pacific Ry. v. Owens (1902), 86 Minn. 188, 90 N. W. 371, 57 L. R. A. 634, 91 Am. St. Rep. 336.

25. See also Phillips v. Lawon (1859), 27 Ga. 228, 73 Am. Dec. 731; Hawley v. Lathene (1876), 75 N. C. 505, as in support of the stringent rule.

26. First National Bank v. Graham (1880), 100 U. S. 699, 25 L. Ed. 750.

27. Whitney v. First Nat. Bank (1880), 151 U. S. 664, 26 L. Ed. 212.

the case of a state bank,<sup>28</sup> this case quoting from the Graham case, as follows: "If a bank be accustomed to take such deposits as the one here in question and this is known and acquiesced in by the directors, and the property deposited is lost by the gross carelessness of the bailee, a liability ensues in like manner as if the deposit had been authorized by the terms of the charter." There are cited for this principle, cases from Pennsylvania, Iowa, Massachusetts and Georgia.

Mr. Justice Field, in a case where there was a deposit with a partnership engaged in business as bankers,<sup>29</sup> said: "If the bonds were received by the defendants for safe keeping, without compensation to them in any form, but exclusively for the benefit of the plaintiffs, the only obligation resting upon them was to exercise over the bonds such reasonable care as men of common prudence would usually bestow for the protection of their own property of a similar character. No one taking upon himself a duty for another without consideration is bound, either in law or morals, to do more than a man of that character would do generally for himself under like conditions. The exercise of reasonable care is in all such cases the dictate of good faith.  
\* \* \* The doctrine of exemption from liability in such cases was at one time carried so far as to shield the bailees from the fraudulent acts of their own employes and officers, though their employment embraced a supervision of the property, such acts not being deemed within the scope of their employment."

An Illinois case<sup>30</sup> speaks of the above case as typical

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28. *Manhattan Bank of Memphis v. Walker* (1889), 130 U. S. 267, 32 L. Ed. 959.

29. *Preston v. Prather* (1891), 137 U. S. 604, 34 L. Ed. 788.

30. *Gray v. Merriam* (1893), 148 Ill. 179, 35 N. E. 810, 32 L. R. A. 769, 39 A. M. St. Rep. 172.

of cases which present "more liberal views as to the liabilities of bailees without reward," and it declares that: "when securities are deposited with banks accustomed to receive such deposits, they are liable for any loss thereof occurring through the want of that degree of care, which good business men should exercise in keeping property of such value."<sup>31</sup>

Thus it is seen that, though banks were not in the business of exacting compensation for safe-keeping for customers of special deposits, yet they were not deemed gratuitous bailees on the old common law theory of the duties and liabilities of such bailees. Liability on another theory seems to have attached to them, because of the reputation they enjoyed and necessary to be sustained as a business asset.

#### § 95. Property Held as Collateral by a Bank.

It was held in a Georgia case that to prevent a special deposit being a gratuitous bailment with a bank there must be something directly connected with the bailment in the way of compensation, direct or indirect, accruing to the bailee. "The fact that the special depositor is also a general depositor in the bank is hardly sufficient, unless the retention of the general deposit account was stipulated for. So an incidental earning of fees for exchange or collection would not be a consideration, unless the depositor was obliged to allow it. Such benefits as are wholly contingent and dependent on the pleasure of the depositor cannot affect the character of the bailment." And "the custom of the bank to accept special deposits does not absolutely demonstrate a general, still less a universal receipt of consideration."<sup>32</sup>

31. See also *First Nat. Bank v. Zent* (1883), 39 Ohio St. 105.

32. *Merchants' Nat. Bk. v. Guilmartin* (1892), 88 Ga. 797, 15 S. E. 831, 17 L. R. A. 322. See also *Merchants' Nat. Bank v. Carhart* (1895), 95 Ga. 394, 22 S. E. 628, 32 L. R. A. 775, 51 Am. St. Rep. 95.



This case shows that benefit to bailee may arise out of very slight circumstances to change a deposit of this kind to one for mutual benefit of bailor and bailee, or for exclusive benefit of bailee. I may say, however, that even were a bailment that of a strictly gratuitous nature, yet in the latter Georgia case, it was ruled that the mere employment of trusted agents, who made way with the deposit, was not sufficient to exonerate the bailee. It must go further and show it exercised proper supervision over such agents.

A deposit is not gratuitous where a bank is paid for collecting dividends, and if they are converted by a bank manager, the bank will be responsible.<sup>33</sup>

Where bonds and securities are deposited with a bank as collateral security upon a loan made by it, this does not make a bank an insurer of the safety of the deposit, but does bind it to take the same care of it as of its own property,<sup>34</sup> and this would be true as to such collateral remaining in a bank after the loan has been paid, if it is left in anticipation of an application for a further loan.<sup>35</sup>

It was said as to this that: "The bonds came into its (bank's) hands in the usual course of business as collateral security for loans to a customer, and it had never relieved itself of the liability thereby incurred by returning, or offering to return them to their owner. On the contrary, it agreed, through its proper financial agent, to continue as their custodian for the purposes for which they had theretofore been employed. \* \* \*

The extension of lines of discount and credit to persons

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33. *Re United Service Co.*, L. R. 6, Ch. 212.

34. *Jenkins v. Nat'l. Village Bank* (1870), 58 Me. 275.

35. *Onderkirk v. Central Nat. Bank* (1890), 119 N. Y. 263, 23 N. E. 875.



engaged in business upon stipulated securities is one of the most common features of banking, and it must often happen that such loans are from time to time wholly or partially paid and satisfied. Intervals of days, weeks and months may frequently elapse between discounts, and it would be quite absurd to hold that during these periods the bank occupied any other relation to its customer than that of custodian of his bonds for purposes, deemed mutually beneficial to both parties." The same rule applies to securities forwarded with an application for a loan.<sup>36</sup> What is the rule to be applied to safe deposit companies and to trust companies renting safety deposit boxes will be now considered, and afterwards there will be noticed cases where in agreements by way of reorganization or otherwise special deposits in the nature of escrow are made.

**§ 96. Liability of Safe Deposit Companies.** The relation a company, which holds itself out among other things, to care for property placed with it for safe-keeping, for a compensation to be paid to it for such safe-keeping, is that of a depositary for hire. It has been said, that storage paid for by the owner of goods "is a species of bailment like that existing in the case of the depositor in a safe-deposit company, who hires a box for his valuables and keeps the key."<sup>37</sup> It was said in this case that it was immaterial, that in conversations between the parties the price charged was called rent, as it was "unnecessary to define the precise nature of the contract or to give it a name. The defendant assumed the obligation of ordinary care and prudence in

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36. *Bank of Montreal v. White* (1880), 154 U. S. 660, 26 L. Ed. 307. See also *Third Nat. Bank v. Boyd* (1875), 44 Md. 47, 22 Am. Rep. 35; *Cutting v. Morlor* (1879), 78 N. Y. 454.

37. *Jones v. Morgan* (1882), 90 N. Y. 479.

keeping the goods." And a later New York case<sup>38</sup> referred to the charter powers of defendant as authorizing it "to receive on deposit as bailee for safe-keeping and storage, jewelry, plate, money, securities and other valuable things, upon such terms and for such compensation as might be agreed upon by said corporation and the owners of the property or the bailors."

In speaking of the arrangement whereby a depositor was furnished with a key to a safety box rented, the Court said that the company was no doubt "a bailee for reward." The Court then proceeded to say that: "When property, in the custody of a bailee for hire, is demanded by third persons, under color of process, it becomes their duty to ascertain whether the process is such as requires him to surrender the property, and if it is not, then it is his right and duty to refuse and to offer such resistance to the taking and to adopt such measures for reclaiming it, if taken, as a prudent and intelligent man would if it had been demanded and taken under a claim of right to the property by another without legal process. The defendant did not discharge the duty that it owed to a bailor and owner of the property by merely making a formal protest against entering the vaults where the property was. A person who would allow his own property to be taken from him under like circumstances, and without doing more to prevent such a result or to repossess himself of it, when taken, could scarcely be called a prudent man."

Another New York case,<sup>39</sup> which refers to the Roberts case, *supra*, as authority, speaks of safe deposit

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38. Roberts v. Stuyvesant Safe Deposit Co. (1890), 123 N. Y. 57, 25 N. E. 294, 9 L. R. A. 438, 1 Am. Neg. Cas. 535.

39. Lockwood v. Manhattan S. & W. Co. (1898), 28 N. Y. App. Div. 68, 50 N. Y. Supp. 974.

vaults and of a customer having the right of access to separate boxes rented therein only with knowledge and participation of the company's employes. The court said of a contention by defendant: "It is urged upon the part of the defendant that it was not the bailee, because it was not in possession of the plaintiff's property. If it was not, it is difficult to know who was. Certainly the plaintiff was not, because she could not obtain access to the property without the consent and active participation of the defendant. She could not go into her safe unless the defendant used its key first and then allowed her to open the box with her own key, thus absolutely controlling the access of the plaintiff to that which she had deposited within the safe. The vault was the defendant's and was in its custody, and its contents were under the same conditions. As well might it be said that a warehouseman was not in possession of silks in boxes deposited with him as warehouseman, because the boxes were nailed up and he had no access to them. It is perfectly clear that under the ordinary principles governing bailments, the relation of the defendant to the plaintiff was that of a depositary for hire, and that when the plaintiff gave evidence tending to show that she had placed property within that safe which was owned by and in the custody of the defendant, and that it had been abstracted therefrom, she had made out a *prima facie* case calling upon defendant for explanation."

There are many other cases which hold, in effect, that the arrangements usually made as to keys by depositor and company in no way affect the duty of the company to "exercise that ordinary care and vigilance which men ordinarily exercise and ought to exercise

under such circumstances in the protection of their own property.”<sup>40</sup>

In the Mayer case, *supra*, it was said that: “Although one who hires a box in the vaults of a safety deposit company may keep the key himself, yet the company without any special contract to that effect, will be held to at least ordinary care in keeping the deposit. The duty of exercising such care arises from the nature of the business which the safety deposit company carries on. The obligation to discharge such duty is implied from the relation between the parties.”

The Cussen case, *supra*, said where there was question of money having been abstracted from a box in a safety vault, that the company “was required to use that degree of care in the protection of this property from thieves without and thieves within, and it was required to use that same degree of care in the selection of its employes and in the supervision of their conduct after they were employed.”

And it was held in a Texas case,<sup>41</sup> that in view of provisions in the use by the depositor of his own key and the necessity of patrons to register and be identified when applying to enter the vault, the loss by plaintiff of his key in no way amounted to contributory negligence making it possible for the finder to abstract money from plaintiff's box.

It is thus seen, that all arrangements so far as access to a deposit in a safety vault of a company are concerned seem not to affect the question of possession of

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40. Safe Deposit Co. v. Pollock (1878), 85 Pa. St. 391, 27 Am. Rep. 660; Mayer v. Brensinger (1899), 180 Ill. 110, 54 N. E. 159, 72 Am. St. Rep. 196; Cussen v. So. Cal. Sav. Bank (1901), 133 Cal. 534, 65 Pac. 1099, 85 Am. St. Rep. 221.

41. Guaranty Trust Co. v. Diltz (1906), 42 Tex. Civ. App. 26, 91 S. W. 596.

a depositary for hire. These are merely for convenience and possibly amount to additional guaranty by the depositary that the deposit shall remain intact. Of course, it must be conceded, that, if a depositor's negligence contributed materially to loss of a deposit, this might exonerate the depositary, but, if his carelessness is specifically offset by provisions in an agreement for deposit so as to render it harmless, the case as to liability might remain as before any act of carelessness.

§ 97. **Possession by Safety Deposit Company so far as Attachment is concerned.** A bank in which defendant in a suit had rented a box in a safety deposit vault was garnisheed and it answered that it did not have effects of defendant under its control, unless they were in the box and it recited the facts about it having one key and the defendant another and the necessity of the two acting in co-operation in order to open and get at the contents of the box. The court held that the company did have control, in the sense of the statute, over the box, because: "At any time on the request of the defendant the garnishee could put it within the power of the defendant to remove the contents of the box, and the defendant could not remove the contents without the consent and active co-operation of the garnishee. As against the defendant then the garnishee had control of the box." It was then noted that the contents could be ascertained by causing the defendant to be examined as a witness, and the court might even require an inspection of the contents.<sup>42</sup> The effect of this is merely that seizure may be made by garnishment and the remedy perfected by supplementary proceedings.

The question was gone into very much more fully

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42. *Trowbridge v. Spinning* (1900), 23 Wash. 48, 62 Pac. 125, 54 L. R. A. 204, 83 Am. St. Rep. 806.



in a case decided by the Rhode Island Supreme Court.<sup>43</sup> After considering cases where sealed packages were held, or not, attachable, according to the terms of statute, the court said: "If these boxes are in possession of the garnishee, as we find them to be, then the condition of the contents thereof, with regard to their possession by the garnishee, does not differ from that of the contents of sealed parcels. \* \* \* In the case of these boxes a slightly complicated method has been adopted for securing their contents against access; but the method is immaterial. The position of the contents \* \* \* does not differ from that of the contents of a box or trunk locked and placed by its owner for safe-keeping in the vault of the garnishee, which box or trunk might be opened directly by the use of one key retained by the owner of the box. If the receptacle is in the hands or possession of the garnishee, as those words are used in our statute, then the contents of such receptacle, though the owner has attempted to bar access to them, are also in the garnishee's hands or possession. It is perceived that the Rhode Island statute is not as narrow as that of California, which says "under his control."

The Tillinghast case refers to two prior cases<sup>44</sup> holding the other way, and speaks of them as being the basis of statements made accordingly by a number of text writers. Among cases ruling like the Tillinghast case is a late case from Illinois,<sup>45</sup> and also a case by

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43. *Tillinghast v. Johnson* (1912), 34 R. I. 136, 82 Atl. 788, 41 L. R. A. (N. S.) 764.

44. *Gregg v. Hudson* (1871), 8 Phila. (Penn.) 91; *Bottom v. Clarke* (1851), 7 Cush. 487.

45. *National Safe Deposit Co. v. Stead* (1911), 250 Ill. 584, 95 N. E. 973, 23 Ann. Cas. 430.



District of Columbia Supreme Court.<sup>46</sup> This latter case, speaking of a box in a safety vault, said: "A mere device to guard from intrusion the defendant's property in the vault of a trust company neither divests the defendant of his property, nor releases the company from its charge of defendant's property. There is no magic in two keys, a master key and a customer's key, to put property belonging to a defendant in an attachment beyond the reach of creditors and the process of the courts."

The Federal Supreme Court,<sup>47</sup> affirming the case *sub nom* National Safe Deposit Co. v. Stead, *supra*, applied the several cases above cited to a statute requiring a safe deposit company to refuse to deliver to legal representatives of a decedent any securities belonging to such decedent without giving notice to the state's attorney general and treasurer, so that they might examine them before delivery, the safe deposit company being required to retain a sufficiency of such securities to pay inheritance tax.

The court thought that the statute in speaking of possession used an ambiguous word which well might cover such control as the deposit company exercised over securities placed in the boxes in its vaults, without it being at all necessary to say whether there was a strict bailment or what was the nature of the bailment, if there were such.

**§ 98. Joint Renting and Access.** Where a safe or safe deposit box or compartment is rented by more than one it is usually taken jointly with access to either.

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46. Washington L. & T. Co. v. Susquehanna Coal Co. (1905), 26 App. D. C. 149.

47. National Safe Dep. Co. v. Illinois (1914), 232 U. S. 58, 58 L. Ed. 504.

In speaking of such an arrangement, a United States District Court said:

“The condition of things was like that of two persons, lawyers or brokers, occupying the same office, with a common safe or vault, to which each has access, and in which each is accustomed to deposit his papers or securities.”<sup>48</sup>

In a New York case such depositors were held to be joint lessees, but whether this relation was that of joint tenants or tenants in common was immaterial to the issue.<sup>49</sup>

Such depositors are, of course, exposed to loss by the acts of each other,<sup>50</sup> and powerless in such instances to recover from the depositary.

A constructive trust exists between the depositors, so that one cannot renew the lease to the exclusion of the other or others. Thus in an action<sup>51</sup> by the executors of a deceased joint lessee against the safe-deposit company and the other lessee, who had renewed the lease of the box in his own name, it was held that equitable relief would be granted compelling access.

The court said: “The remedy at law by an action for ejectment was inadequate, since the legal title of the defendant would effectually bar the recovery of possession against him by that means. Proceedings to recover the securities and papers deposited in the safe, or an action to recover the value thereof, could only

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48. *Bangor Electric Light & Power Co. v. Robinson* (1892), 52 Fed. 520, 522.

49. *Hackett et al. v. Patterson et al.* (1891), 16 N. Y. Supp. 170.

50. *Bangor Electric Light & Power Co. v. Robinson* (1892), 52 Fed. 520, wherein indorsed certificates of stock belonging to one joint depositor were stolen from a safe deposit box by another, who sold them to an innocent purchaser. Recovery was allowed against the innocent holder.

51. *Hackett et al. v. Patterson et al.* (1891), 16 N. Y. Supp. 170.

result in partial relief to the plaintiffs, since possession of the safe, or access thereto, could not be therein awarded, and the contents thereof might not be susceptible of pecuniary recompense."

A right by survivorship to contents of a safety deposit box rented by husband and wife was denied.<sup>52</sup> The contract of rental read as follows: "We agree to hire and hold safe No. — as joint tenants, the survivor or survivors to have access thereto in case of either; but either to have power to appoint a deputy." Of this the court said: "It has not been possible to find that this was anything more than an agreement to hold the box together and to permit access thereto by each other."

**§ 99. Access under Power of Attorney.** The risks of granting a power of attorney to secure access to a safe or safe deposit box involve the honesty, power and identity of the agent appointed. If he is dishonest, any loss thereby caused will fall upon the depositor who appoints him.<sup>53</sup> If he lacks the requisite authority or is not the person described in the power of attorney, the loss may fall upon the depository. But in spite of these grave risks, the instances are many that render this means of making or removing deposits a necessity. It is thought that the depository cannot deny it in a proper case, though regulation of access by agent is a proper and commendable precaution in the interest of both parties.

A case of liability was made against the depository in an Illinois case, where two strangers were admitted

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52. *Matter of Brown* (1914), 86 Misc. (N. Y.) 187, 149 N. Y. Supp. 138. Where husband and wife rented a safe deposit box together, property placed therein by each did not belong to the other. *In re Squibb's Estate*, 160 N. Y. Supp. 826.

53. For an instance of such loss see *Carlisle v. Norris* (1913), 157 N. Y. App. Div. 313, 142 N. Y. Supp. 393.

to the box who had a key and an alleged power of attorney, but the depositary *did not retain the power of attorney, or take the name of the notary before whom it was executed, or require the strangers to identify themselves, or ascertain their address or business.* This the Supreme Court of Illinois said tended to show "not only want of ordinary care, but actual negligence in the protection of the property intrusted."<sup>54</sup>

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54. *Mayer v. Brensinger* (1899), 180 Ill. 110, 54 N. E. 159, 72 Am. St. Rep. 196.

## CHAPTER XV

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### Escrows

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§ 100. **Preliminary.** The organization of a trust company, with its long life, its ability to surrender its contracts to successors upon expiration of its life, its being supervised under strict regulation, and its many other safeguards in respect to the care and custody of property, and especially the making of such care and custody features of business under specific charter provisions seem to provide, not only for the business world, but also for private interests, an agency for the carrying out of escrow agreements of a peculiarly fit nature, and also of agreements in the nature of escrow.

There is so much to be implied in a contract with a corporation, which holds itself out for the doing of a particular character of business, that the same particularity of statement in contracts made with it is not necessary as in an agreement whereby an individual is to act in a case under this power, and there need be no special caution against the rights of third persons against a party holding an instrument in escrow, or in performing an agreement of such nature. Confusion might arise, especially when an individual should go into bankruptcy, or make an assignment in insolvency proceedings or

should die. The records kept by a trust company necessarily must be kept clearer than in the case of an occasional transaction with an individual, and the small fee ordinarily paid in such matters nevertheless gives to all parties in interest the right to inspection of papers and reports as occasion arises. Advantages of the above and other kinds I hope specifically to point out in this chapter.

**§ 101. The Nature of a Strict Escrow Agreement.** An escrow arises, when some written instrument if delivered would take effect according to its tenor, yet is in suspension, irrecoverable for a stated period, until the party to be benefited by its complete delivery shall perform or cause to be performed some precedent condition,<sup>1</sup> or that some third party shall perform some act,<sup>2</sup> or where merely some event shall occur,<sup>3</sup> but decision is variant whether a mere event, which is to happen does anything more than hold delivery in suspense, and, therefore, does not make of an instrument a true escrow, that is an instrument to become effective on compliance with a certain condition.<sup>4</sup>

A pure escrow agreement, therefore, provides for the delivery of an instrument when the conditions of its deposit in escrow have been fulfilled, or an event stated to happen prior to delivery shall have happened. This kind of an agreement involves merely proper care and

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1. Hoyt v. M. Lagan (1893), 87 Iowa 746, 55 N. W. 18; Taylor v. Cate (1896), 29 Ore. 515, 45 Pac. 800; Landon v. Brown (1894), 160 Pa. 538, 28 Atl. 921.

2. Hughes v. Thistlewood (1888), 40 Kan. 232, 19 Pac. 629; Wright v. Lang, 66 Ala. 389.

3. Stone v. Duvall (1875), 77 Ill. 475; Haeg v. Haeg (1893), 53 Minn. 33, 55 N. W. 1114.

4. Foster v. Mansfield (1842), 3 Met. (Mass.) 412, 37 Am. Dec. 154; Stephens v. Rinchart (1872), 72 Pa. St. 434.



custody and a seeing to the performance of conditions or the happening of an event mentioned before the instrument deposited in escrow shall be surrendered to a party to be benefited thereby. This kind of an escrow does not so greatly call into employment the great advantages of a trust company as do those agreements rather in the nature of, though strictly not escrow agreements.

In pure escrow agreements the duties and powers of depositaries of escrows are exceedingly narrow. Custody and strict compliance with specific directions as to disposition of the escrow are the measure of liability and there is little room for the exercise of discretion, and if the depositary acts in good faith the courts will afford him the utmost protection in its power.<sup>5</sup> A deposit of this kind does not concern property so much as it does mere writing concerning rights in property or in contract. Therefore the holder of an escrow is never called a trustee. This is well illustrated in a case decided by Fifth Circuit Court of Appeals,<sup>6</sup> where there was considered the effect of a special legislative charter to a railroad company. This provided for subscriptions by counties, the issuance of stock to the counties and of bonds by them and the deposit of the latter with a designated trust company to be held in escrow and delivered to the railroad company as provided by each county and the railroad company.

The trust company brought suit to compel defendant company to deposit with it bonds called for by a certain agreement. The court alluded to an averment that "appellant in its bill styles itself a 'trustee,'" but the

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5. *Bean v. American Loan & Trust Co.* (1890), 122 N. Y. 622.

6. *Farmers' Loan & Trust Co. v. Board of Supervisors* (1899), 93 Fed. 579, 35 C. C. A. 460.

court said: "The elementary idea of an escrow assumes that the obligatory writing has been delivered by the party executing it to a third person, to be held by him until the performance of a specific condition by the obligee, or the happening of a certain contingency, and then to be delivered by the depositary to the obligee. \* \* \* To become an escrow, as well as to become a deed or writing of present obligation, there must be delivery of the instrument." Until the company became an actual depositary it was said: "It has not and cannot have any interest in the negotiations. It has done no service nor contributed anything of value that can support its claim to have an interest in the contract between these parties."

It is not conclusive that the depositary of an escrow may not be vested with some discretion, but it is not a discretion in reference to the management of property, but a discretion merely in determining when a condition precedent to the surrender of an escrow has been performed,<sup>7</sup> especially if the escrow is a paper negotiable in form. It is the general rule, however, that an unauthorized surrender by a depositary of an escrow does not bind the obligor.<sup>8</sup> For the creation of a depositary of an escrow it is essential that there exist a binding contract between parties, otherwise valid conditions as to its retention or surrender cannot occur.<sup>9</sup> But while an escrow is itself an instrument in writing, the contract back of it need not itself be in writing.<sup>10</sup>

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7. *Provident Life & Trust Co. v. Mercer County* (1898), 170 U. S. 593, 42 L. Ed. 1156.

8. *Mays v. Shields* (1903), 117 Ga. 814, 45 S. E. 68; *Powers v. Rude* (1904), 14 Okl. 381, 79 Pac. 89; *Schmidt v. Musson* (1906), 20 S. D. 389, 107 N. W. 367.

9. *Clark v. Campbell* (1901), 23 Utah 569, 65 Pac. 496, 54 L. R. A. 508, 90 Am. St. Rep. 716.

10. *Thoraldsen v. Hatch* (1902), 87 Minn. 168, 91 N. W. 467.

§ 102. **Summary.** It is true that in agreements in which depositaries for escrows are selected, the business of trust companies and their facilities for safe-keeping of instruments of writing make such companies come to the minds of parties very readily, but I wish to distinguish in this work these deposits from those in which the relation is rather that of trustee than depositary. These latter deposits are greatly more important and as a general thing might extend over a vastly greater period of time. Escrows generally contemplate a brief period of time, especially when surrender is dependent upon the performance by obligee of a condition precedent. Escrow is an arrangement to arrest or keep in suspension the fulfillment of a contract until a condition is performed or an event happens. The contract may be and often is very simple and, being upon a present consideration, its fruition is not apt to be delayed a great while. In this way the deposit of an instrument in escrow, is but a detail in negotiation.

## CHAPTER XVI

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### Trust Companies as Conveyancers, Abstractors and Title Insurers

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§ 103. **In General.** Trust companies in many states have the charter or statutory power to examine, certify and guarantee titles to real estate. As stated by the attorney-general of Indiana in an opinion rendered on December 9, 1910, trust companies have no such powers, in the absence of express authority. In its guarantee features, it is essentially an insurance business, and therefore attracts insurance supervision, as distinguished from the banking supervision generally applicable to trust companies.

§ 104. **Searching, Abstract Business and Title Insurance Defined and Contrasted.** In a Tennessee case,<sup>1</sup> the court said:

“To furnish abstracts of titles is a business. Parties undertaking it assume the responsibility of discharging its duties in a skillful and careful manner. Patience in the investigation of records is the main capacity required. There is no professional opinion. The agent has only to furnish the facts from the register’s office, without concern for their legal effects. Upon the facts fur-

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1. Dickel v. Nashville Abstract Co. (1890), 89 Tenn. 431, 14 S. W. 896, 24 Am. St. Rep. 616.

nished, the purchaser must determine for himself on their sufficiency."

Title insurance has been defined thus: "A policy of title insurance means the opinion of the company which issues it, as to the validity of the title, backed by an agreement to make that opinion good, in case it should prove to be mistaken, and loss should result in consequence to the insured."<sup>2</sup>

In a case<sup>3</sup> wherein recovery upon a policy was defeated by reforming it so as to give it effect upon the date intended, it was said that:

"The risks of title insurance end when the risks of other kinds begin. Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, is designed to save him harmless from any loss through defects, liens or incumbrances that may affect or burden his title when he takes it. It must follow, as a general rule, therefore, that when the insured gets a good title, the covenant of the insurer has been fulfilled and there is no liability. It is apparent from the very nature of the contract that it usually bears the same date as the deed of the title which it purports to insure, and that if, in a given case, there is a discrepancy between these dates, it must be due to some exceptional circumstance which should be noted in the contract. In the contract before us the absence of any special note as to the date negatives any intention to take this case out of the general rule."

In the same case the distinction between the two

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2. *Fohrenbach v. German-American Title & Trust Co.* (1907), 217 Penn. 331, 66 Atl. 561, 12 L. R. A. (N. S.) 465.

3. *Trenton Potteries Co. v. Title Guarantee & Trust Co.* (1903), 176 N. Y. 65.

activities of searching and insuring is brought out. The court said:

“The contract of insurance is distinct and separate from the contract of searching. This action is brought upon the contract of insurance. Under the contract for searching titles the defendant may be liable for any damages which its negligence may have imposed upon the plaintiff. Under the contract of insurance no question of negligence in searching can arise.”

**§ 105. Relation assumed by Trust Company in Examining Titles and Acting as Conveyancer.** Where a trust company was retained to draw up a contract of sale, search title, and secure a deed, and it was sued for improperly describing the property conveyed, it was held by the New York Court of Appeals that:

“The defendant is a domestic corporation organized for the purpose, among other things, of examining and guaranteeing titles to real estate for hire and profit. In all matters relating to conveyancing and searching titles it holds itself out to the public and assumes to discharge the same duties as an individual conveyancer or attorney, and, hence, in such transactions its duties and responsibilities are the same. \* \* \* The obligations and duties that the parties assumed towards each other were, therefore, similar in all respects to those growing out of the relation of attorney and client in transactions of the same character, and hence the case must be determined upon the same principles.”<sup>4</sup>

**§ 106. Duty as Conveyancer to Advise Client of Encroachments.** Holding that plaintiff was entitled

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4. *Elmer v. Title Guarantee & Trust Co.* (1898, 156 N. Y. 10. See also *Glyn v. Title Guarantee & Trust Co.* (1909), 132 N. Y. App. Div. 859, 117 N. Y. Supp. 2424.



to recovery where she alleged that she employed a title guarantee company to search the title and purchased relying upon a letter from them that failed to mention certain encroachments, the court said:<sup>5</sup>

“It will be observed that defendant undertook to act for plaintiff in two capacities—as a conveyancer, who examined the title and undertook to advise her whether it was good and marketable, and as an insurer, who undertook to insure that she had a good and marketable title. In the former capacity, the defendant assumed the same responsibilities and owed to the plaintiff the same duty as if it had been an individual attorney or conveyancer. This involved upon its part the exercise of due care and skill in investigating the title, and the utmost frankness toward the plaintiff in disclosing to her the result of its investigations and in advising her as to what course she should take in view of the facts which had been discovered respecting the title. It has assumed the relation of attorney, and thereby assumed all the obligations of an attorney to his client. \* \* \* This letter falls far short of informing plaintiff of or even suggesting to her the true state of the encroachments upon the property.”

**§ 107. Liability and Measure of Damages for Negligence and upon Title Policies.** The case cited<sup>6</sup> was an action brought to recover damages alleged to have been sustained through the negligence of defendant trust company in conducting a purchase of real estate for the plaintiff. The trust company procured a deed covering an adjoining house, instead of the one con-

5. *Glyn v. Title Guarantee & Trust Co.* (1909), 132 N. Y. App. Div. 859, 117 N. Y. Supp. 424.

6. *Ehmer v. Title Guarantee & Trust Co.* (1898), 156 N. Y. 10, 50 N. E. 420.

tracted for. The grantee secured a reformation of the erroneous deed. An additional mortgage had been placed upon the property desired, on foreclosure of which the plaintiff was evicted. In affirming a judgment for damages against the trust company for its negligence in handling the matter, the New York Court of Appeals said:

“The defendant undertook to perform duties in the nature of professional services for the plaintiff, and on the findings and facts of the case was guilty of negligence. The damages which the plaintiff sustained as the natural and necessary result of this negligence was the loss of the money which she paid on the faith of the defendant’s advice. There are no facts in the case upon which to found any duty or obligation on her part to mitigate the damages, and so we think the judgment is right and should be affirmed.”

In an action to recover damages for failure to except certain encroachments in the title policy, it was held that plaintiff “is entitled to recover the difference between the value of the property when purchased, as it was with the encroachments and its value as it would have been if there had been no encroachments.”<sup>7</sup>

A plain case of negligence in abstracting was made out in Missouri,<sup>8</sup> where the abstract omitted a judgment in force against the property. In the course of its opinion the court said:

“Plaintiff paid for an examination and got one. He got no certificate that the title was perfect, because defendant would not give a certificate, as the title rested

7. *Glyn v. Title Guarantee and Trust Co.* (1909), 132 N. Y. App. Div. 859, 117 N. Y. Supp. 424.

8. *Renkert v. Title Guaranty Trust Co.* (1903), 102 Mo. App. 267, 76 S. W. 641.

on a tax deed. But the company undertook to inform him concerning the state of the title, in order that he might buy intelligently, and furnished a document purporting to inform him. The document left off a judgment lien, which omission not only tended to mislead plaintiff, but was nearly certain to mislead him. Misleading information is worse than none. It was actionable negligence to furnish such a document, call it abstract, chain of title, or what you will; for it was delivered and accepted as one on which a prospective purchaser might base his decision to buy or not."

A trust company as abstractor was held not liable as a matter of law, for negligence in not reading a deposition on file in judicial proceedings, whereby it would have learned that the proceedings conveyed "only one-sixteenth of the title and fifteen-sixteenths of a life estate of the fee," as stated by it.<sup>9</sup> The court remarked with reference to the abstractor's duty to examine court records:

"Such an examination would ordinarily be sufficient, if the record showed jurisdiction in the court to render the particular judgment, and the parties to the judgment and the title claimed under it to be identical in name and description, and it would not be negligent in the examiner to fail to make inquiry *dchors* the record to ascertain if there might not be some possible defect in the proceedings or error in the name or description of the parties. \* \* \* But, if he read the deposition it was of sufficient importance to put an ordinarily prudent man on inquiry, and if he neglected to make inquiry he would unquestionably be guilty of negligence."

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9. Keuthan v. St. Louis Trust Co. (1903), 101 Mo. App. 1, 73 S. W. 334.

**§ 108.** When the Company as Abstractor is Liable to Employer and when Liable to Third Persons for whose Benefit Abstract is obtained. The applicant for title examination frequently uses the abstract as an aid in selling his property or in securing a loan thereon. When the third person, i. e., the purchaser or lender, to whom the abstract is shown or delivered, is legally unknown to the company, it owes him no duty.

“The ground of the action against the abstractor is in contract, and not in tort, and the weight of authority is to the effect that the abstractor is liable only to the person to whom he furnishes the abstract, and that he is not liable to a third person, to whom his customer presents and with whom his customer uses the abstract in the procurement of money or property, unless there is a republication of the abstract to such third person.”<sup>9½</sup>

The exception is established and the company is liable to the third party where the abstract company knew that search was made for the exclusive benefit of the third party and delivered the abstract to it,<sup>10</sup> where the applicant made the proposed use known to the company<sup>11</sup> and where the vendor and purchaser both paid for the abstract, and the company knew for what purpose the abstract was being used.<sup>12</sup>

**§109.** Title Insurance Covers Interest Insured irrespective of the Real Interest of the Policy Holder.

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<sup>9½</sup>. *Equitable Building & Loan Ass'n. v. Bank of Commerce & Trust Co.* (1907) (Tenn.), 102 S. W. 901, 12 L. R. A. (N. S.) 449, and cases cited therein.

10. *Western Loan & Savings Co. v. Silver Bow Abstract Co.* (1904), 31 Mont. 448, 78 Pac. 774, 107 Am. St. Rep. 435.

11. *Economy Building & Loan Ass'n. v. West Jersey Title & Guarantee Co.* (1899), 64 N. J. L. 27, 44 Atl. 854.

12. *Denton v. Title Company* (1903), 112 Tenn. 320, 79 S. W. 799.

**Insurance Company placed on Notice to use Great Care.** In a Pennsylvania case,<sup>13</sup> an applicant secured a policy assuring him a fee simple interest. Under a subsequent partition suit it developed that he was only entitled to a one-half interest in the property. He was held to be entitled to recovery upon the policy for the value of the other half. In the course of its opinion the Supreme Court of the State remarked:

“In the present case, the validity of the plaintiff’s claim to the entire interest in the property depended upon the construction of the language of the will. \* \* \* Evidently the defendant company with the will before it, construed the devise as a life estate in the first taker and a fee in the remainderman. \* \* \* In adopting this view it was mistaken. \* \* \* Can there be any doubt that the reduction of his interest in the property from an ownership of the whole, to that of one-half, was a defect, coming directly within the terms of the policy? No matter whether or not the question of the amount of his insurance was doubtful when the policy was issued, the risk of insuring him in his claim of title was one which the defendant could legitimately take, if it chose to do so. Insurance carries with it the idea of some risk. If there were no risk, there would be no cause for insurance. \* \* \* *Actual loss, of course, must precede the right of compensation; but that is measured by the standard accepted as between the parties. In this case the standard of interest, which was claimed by appellant was ownership in fee of the entire property.* That standard was, after examination of the muniments of title, by the defendant company, admitted as correct, and the policy of insurance was issued, for

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13. *Foehrenbach v. German-American Title & Trust Co.* (1907), 217 Penn. 331, 66 Atl. 561, 12 L. R. A. (N. S.) 465.



a proper consideration, agreeing to insure the plaintiff against any loss or damage by reason of defects in that particular interest or claim of title which he had presented to the company; that is, against any outstanding claim which would reduce his interest below that which he claimed it to be. \* \* \* *The fact that an application is made for title insurance by one who, at the time, claims to be the owner, is sufficient of itself to put the insurance company on its guard, and ought to be regarded by it as notice that unusual care should be taken in the examination of the title.*" (Italics supplied.)

§ 110. **Record Title Only Insured.** Where the policy of title insurance excepted the tenure of present occupants and incumbrances not shown by any public record, the company was not liable because of a claim of title by adverse possession, or because of a deed of trust recorded by the party in possession, as such record was not in the chain of title.<sup>14</sup> It was said in the opinion that:

"It was left to the appellant to determine, by an inspection and examination of the property, whether there was adverse occupancy or not, to determine for himself by actual measurement, survey, or examination of the premises whether he was getting what he contracted to purchase, or whether there was an adverse claim of title of any character by the occupants of the whole or any portion of the premises. Necessarily the record title is all that a title insurance company can safely or judiciously insure."

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14. *Bothin v. California Title Ins. & Trust Co.* (1908), 153 Cal. 718, 96 Pac. 500, Ann. Cas. 1914 D. 634. So when a policy refers to a survey, copy of which is attached, the title company will not be liable for encroachment not shown by the survey. *Broadway Realty Co. v. Lawyers' Title Ins. & Trust Co.* (1916), 157 N. Y. Supp. 1088, reversing 91 N. Y. Misc. 137, 154 N. Y. Supp. 1024.



§ 111. Policy of Title Insurance construed to be one of Indemnity though Guarantee added. In a Pennsylvania case,<sup>15</sup> a policy of title insurance to protect a mortgage contained the addition of a guaranty to complete certain buildings according to plans. After foreclosure of the mortgage at a loss, suit was brought on the title policy, and evidence was offered to show that the buildings were not constructed as agreed. The Pennsylvania Supreme Court upheld a non-suit on the ground that the policy must be taken as a whole, and as such it was one of indemnity. That in order to recover thereon, plaintiff must show a loss on the mortgage, a mere breach of the guaranty was not sufficient. The opinion states:

“The note, although inaptly worded, is intended to signify if the buildings should not be completed in accordance with the specifications, then if any loss be sustained thereby by plaintiff, such loss should come under the indemnification covenant of the policy. But the contract is not intended by its terms to be severed into two—one to indemnify against loss from defects of title, and one to guaranty that the buildings shall be finished in accordance with certain plans and specifications. If the contract were one of guaranty, then the plaintiff, although she may have lost nothing on her collateral, instead may really have largely profited by the sale of it, would have a right to recover; on the other hand, if the contract were one of indemnity alone, she could not recover unless she proved a loss on the mortgage.”

§ 112. Provision for Subrogation of Company. Effect on Right to Recover on Policy. Where the insured put it out of their power to subrogate the trust

15. *Wheeler v. Equitable Trust Co.* (1903), 206 Penn. 423, 55 Atl. 1065.

company to their rights, they cannot recover on the policy according to a Pennsylvania decision.<sup>16</sup> "Plaintiffs were the owners of second mortgages, and the policy insured the erection of buildings on the premises according to certain plans and specifications within a certain time. Plaintiffs foreclosed their mortgages, became the purchasers at the sale for a part of the amount of their mortgages, and subsequently conveyed them without consideration to the first mortgagees." On appeal, the court said:

"By the terms of the policy the trust company was entitled to subrogation to all the rights and remedies of the insured. As the plaintiffs, by voluntarily conveying the properties to the owner of the first mortgage, put it out of their power to comply with their agreement, they were not entitled to recover."

**§ 113. Voidance of Policy by False Answer in Application.** An application for title insurance contained this provision:

"It is agreed that the following statements are correct and true, to the best of the applicant's knowledge and belief, and that any false statement or any suppression of material information shall avoid the policy."

In answer to the question: "Last price paid for the property?" The applicant said "\$11,000." A policy was issued referring to the application. Recovery upon the policy was denied on proof that the last price paid was \$3,000, and mining stock of \$15,000 par, but of negligible actual value.<sup>17</sup> The Appellate Court said:

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16. *Seymour et al. v. Tradesmen's Trust & Saving Fund Co.* (1902), 203 Penn. 151, 52 Atl. 125.

17. *Stensgaard v. St. Paul Real Estate Title Ins. Co.* (1892), 50 Minn. 429, 52 N. W. 910, 17 L. R. A. 575.

“The court below determined, in effect, as a matter of law, that the above answer was material, and that if plaintiff knew it to be false, it avoided the policy. The plaintiff insists that it was not material, and that at any rate its materiality was a question of fact to be determined by the jury. In the first place the answer to the question, ‘Last price paid?’ was a statement of fact, and not the expression of an opinion, as a statement of value generally is. In the second place the effect of falsity in the statements on the validity of the contract is not made to depend on the intent with which the statement is made, as that the intent shall be fraudulent, but on whether true or false, to the best of the applicant’s knowledge and belief. Where the contract itself does not stipulate the effect that a particular false statement or representation shall have on the contract, or where it stipulates merely that the misrepresentation or suppression of a material fact shall avoid it, the fact misrepresented or suppressed must have been material, as an inducement to enter into the contract; and as the materiality must be shown by matters outside the terms of the contract, it is a question of fact. But the parties may by their contract determine the materiality for themselves, as where they stipulate that if a statement of fact made by one of them, and set forth in the contract, be false, it shall avoid the contract. In such case the statement is in effect a warranty. Whether they have made the statement material, and in effect a warranty, is a question for the court, to be determined by an interpretation of the contract.”

**§ 114. Construction of Policy. Exceptions and Conditions.** An exception in a title policy of “Tenancy of the present occupants” was not sufficiently broad to

cover the claim of a person who, asserting ownership in fee as against the title insured, is in actual adverse possession at the time the policy is issued. The court applied the principle that where an expression in an insurance policy is ambiguous, the ambiguity is to be construed against the insurer.<sup>18</sup>

**§ 115. Rights against Grantor not affected by fact that Grantee has Title Insured.** Where a purchaser took out a title policy and the insurer paid a tax assessment under it, the purchaser was still entitled to recover this tax against the sellers of the property, as the terms of sale provided that all taxes, assessments, etc., would be allowed out of the purchase money and the property conveyed clear.<sup>19</sup> The court said:

“That the assessment was compromised and paid by the Title Guarantee & Trust Company is not material, nor is it material whether or not the company had insured the title to plaintiff, and so, as between it and him, had become liable to pay the assessment. If any such contract of insurance or indemnity existed, it was not made for defendants’ benefit; they were not privy to it and can gain no advantage from it. Even assuming that the company had insured the title and had in fact paid the assessment in fulfillment of its policy, the plaintiff is bound to give it the benefit of all rights and remedies within his reach to make its loss as small as possible. Even if it sued the defendants for the return of the money paid to satisfy this assessment, it would have to do so, not in its own right, but in plaintiff’s right, and as equitable assignee of his cause of action. It

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18. *Place v. St. Paul Title Insurance & Trust Co.* (1897), 67 Minn. 126, 69 N. W. 706, 64 Am. St. Rep. 404. See also *Broadway Realty Co. v. Lawyers’ Title Ins. & Trust Co.* (1915), 91 N. Y. Misc. 137.

19. *Alexander v. Greacen* (1901), 36 N. Y. Misc. 526.

would still be his action, based upon his contract with the defendants. If he sees fit to sue in his own name, although for the ultimate benefit of his insurers, the defendants have no cause to complain."

**§ 116. When Statutes of Limitation begin to run on Title Policy.** As a right of action does not accrue until the insured is evicted by a superior title, statutes of limitation do not begin to run until that time.<sup>20</sup> This subject was thus discussed at length in an action on a policy of title insurance:

"It is contended that the plaintiffs' cause of action is barred by the statute of limitations, as the certificate in question was issued November 25, 1890, and suit begun December 21, 1897, more than five years after the date of the certificate. If the five years' limitation applies, and the cause of action accrued at the date of issuance of the guaranty, then said contention must be sustained. \* \* \* A contract of insurance is an indemnity, and it would not be contended that the cause of action accrued at the date of the policy, and not at the time of the loss. A guaranty is also an indemnity similar to that of insurance, and is governed by the same rule. This stands to reason. It is true that the incumbrance under which the plaintiffs were evicted existed at the time of the issuance of the certificate in question, but the indemnity was not against the incumbrances, but against the assertion of such or other claims or rights against the property, and loss occasioned thereby. The plaintiffs had no cause of action under their contract until the adverse claim against plaintiffs' property was asserted, and the defendant afforded time and opportunity of defending against it. The defense was made by defendant and judgment of eviction against

<sup>20</sup> Purcell v. Land Title Guarantee Co. (1902), 94 Mo. App. 5, 67 S. W. 726.



plaintiffs' tenant was rendered in June, 1897, and the suit was begun in December of the same year. We hold that, under the contract in suit, the breach did not occur until plaintiffs' eviction."

§ 117. **Company's Right of Access to Public Records—Remedy of Mandamus.** Under a law of New York authorizing it "to make, and cause to be made, and to purchase and pay for all such searches, abstracts, indices, maps and copies of records, as the trustees thereof may deem necessary," it was held<sup>21</sup> the "Title Guarantee and Trust Company" had the power "by persons in its employment, to examine the books, records, maps and papers of the register's office, and to make searches, abstracts and copies, so far as that may be considered necessary, to place itself in a position to examine and afford the means of examining titles, without afterwards resorting to the register's office. \* \* \*

The obligation imposed upon the register to permit the books, records and maps of the office to be examined is absolute in its character. And so is the additional right given by the charter to the relator. When either may be applied for in an orderly way, he is bound to acquiesce in the application and permit the examination to be made and the copies and abstracts to be taken. The duty imposed upon him in this respect is entirely ministerial, and its observance may be lawfully required through the instrumentality of the writ of *mandamus*."

In New Jersey, however, it has been held that a corporation organized for "the examination, insurance, and guaranty of the title to lands and estates, or interests

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21. *People ex rel Title Guarantee and Trust Co. v. Reilly* (1886), 38 Hun. (N. Y.) 429.



in lands, in the several counties of this state, and the issuing of certificates, policies, contracts, and undertakings therefor, upon such terms and conditions, restrictions and limitations, as may be determined by said company," has no power to make abstracts of records generally, although it has the same right as any individual, to make a search with reference to a particular title in which it is interested.<sup>22</sup>

The Court of Errors and Appeals said: "The respondent by force of its incorporation, has the same right to inspect the public records which may lawfully be exercised by any individual. Every person, without legislative authority, may engage in the business of examining and guarantying titles as fully as this company is empowered to do by its act of incorporation. When such a person or a company with such authority is employed to examine and guaranty a particular title, the clerk, upon demand, is bound to give access to the records for that purpose, subject to reasonable rules and regulations."

**§ 118. Right of Access to Public Records. "Patent or Short Form Indices" Not Required by Law to be kept.** In New Jersey, where the question presented was "whether the clerk of the Supreme Court should be commanded to permit the Fidelity Trust Company to examine "patent or short form of indices" kept at public expense but not required by law, it was held that mandamus would not be granted. Separate indices required by law were open to the use of the trust company.<sup>23</sup>

22. Barber v. West Jersey Title & Guaranty Co. (1895), (*Magie* dissenting), 53 N. J. Eq. 158, 32 Atl. 222, reversing 49 N. J. Eq. 474, 24 Atl. 381.

23. Fidelity Trust Co. v. Clerk of Supreme Court (1900), 65 N. J. L. 495, 47 Atl. 451.

§ 119. **Right of Access to Public Records. Indices of United States Courts Required by Law to be kept.** In the case cited <sup>24</sup> Mr. Justice Brewer in delivering the opinion of the court said:

“The question presented is to what extent a company engaged in examining titles and certifying thereto may have access to and use the indices and cross indices of the judgment records prepared by the clerks of United States courts. The statute declares that they ‘shall at all times be open to the inspection and examination of the public.’ (25. Stat. at L. 358, Chap. 729, U. S. Comp. Stat. 1901, p. 701.) This company as one of the public has a right to this inspection and examination. It has no monopoly therein, and cannot interfere with the clerk or his assistants in the discharge of their duties, or with the equal rights of other persons to such inspection and examination. \* \* \* Very likely at the time of the passage of the act, the monopolizing of the business of examining titles by one or two corporations was not contemplated. The work was scattered among the separate members of the bar, each one for his own client examining the title to property in which such client was interested. But if Congress provided and intended to provide that one, interested in the title to real estate and desiring an examination of judgment liens thereon, should, either by himself or agent, have access to these indices, that intent and that provision are not changed by the fact that the business has passed from the many to the few. The same right of inspection exists whether one is examining only the title to a single piece of real estate or the titles to a hundred.”

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24. *Vell v. Commonwealth Title Ins. & Trust Co.* (1903), 189 U. S. 131, 47 L. Ed. 741.

§ 120. Regulation by Register where Title Company is making complete copies of Records—Number of Employees Having Access to Records At One Time Limited. A representative of a new title company stated to a county register “that he wanted to put a number of men at work to obtain copies of records in the office, and saying, in effect, that these men were to be employed, not about the business or work of examining titles for transactions then being made, but that their business was to copy the records of the office and accumulate information, so that it would be of value to the company as matter of sale, merchandise or information in the business of searching titles in which it was about to engage; that he represented that he wanted to put from a dozen to twenty or twenty-five men in the office for that purpose; that the defendant (register) told him it would be impossible to have so many men as that for the reason that it would interfere with the current business of the office.” It was finally arranged that three men were to be permitted to engage in this work. Thereafter a fourth man was added to the work, but ostensibly in behalf of another title company. The register refused to permit the fourth to continue with the work. Whereupon the second title company brought *mandamus* proceedings to compel access to the books in behalf of this fourth copyist. The court held that the two companies were practically identical, having the same officers, etc., that there was an attempt to violate the agreement limiting the work to three copyists, and that the limitation to three was reasonable; the relief asked for was denied.<sup>25</sup>

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25. *People ex. rel. German-American Loan & Trust Co. v. Richards* (1885), 99 N. Y. 620, 1 N. E. 258.

§ 121. **Private Abstract Books and Records as privileged against Disclosure under Subpoena Duces Tecum.** In a Georgia case it appears that certain county books and records had been lost, stolen or destroyed. In an effort to reconstruct them a *subpoena duces tecum* was served upon the secretary and treasurer of the "Land Title Warranty and Safe Deposit Company" for records of nearly like character to those that were missing, except that they were "largely abbreviated and made up of characters and other symbols of technical signification." Their examination was denied,<sup>26</sup> the Court saying:

"These abstract books called for by the *subpoena* came into existence as the result of private enterprise and labor, and were afterwards purchased by this private corporation at great expense. They are its private property and are used by it in the conduct of its corporate business. They have never been published. Their contents are kept secret, except as disclosed, piecemeal, in furnishing to applicants therefor abstracts of title relating to specified parcels of real estate; and the furnishing of such abstracts is carried on as a business for pay and profit. The value of the books consists mainly in the secrecy of their contents. Were the information which they afford rendered accessible to the public by other means, the demand for it through the one source now available would be diminished, if not destroyed. The monopoly enjoyed by a closely sealed intelligence office would be broken and the losses inflicted by free competition would be instantly felt in the exchequer of the establishment. There can be no doubt that the corporation has a vital interest in maintaining the secrecy of these

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26. *Ex parte Calhoun* (1891), 87 Ga. 359, 13 S. E. 694.

books as a repository of valuable information. And certainly its secretary is under a duty, both legal and moral, not to aid in killing the goose that lays the golden egg if he can help it. His claim of privilege is therefore as meritorious as if his own personal property were involved."

**§ 122. Liability to Title Company for Fees—Participation of Attorney.** Title searches and insurance are frequently applied for by attorneys acting in behalf of their clients. Sometimes these attorneys are given a percentage of the fees collected by the title company for bringing them the business. As the attorney thus acts as the agent of the applicant, he is not personally liable to the title company for their services. This general rule was applied where a law clerk signed another's name to an application at the insistence of the company,<sup>27</sup> and where an attorney advised the company of his professional participation in an application signed by a corporate client.<sup>28</sup> "When the principal is known the agent is not liable unless he has assumed a personal liability in clear and unmistakable language."

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27. *Title Guarantee & Trust Co. v. Levitt* (1907), 121 N. Y. App. Div. 485, 106 N. Y. Supp. 147.

28. *Title Guarantee & Trust Co. v. Sage* (1911), 146 N. Y. App. Div. 578, 131 N. Y. Supp. 274.

## CHAPTER XVII

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### Corporations Practicing Law

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§ 123. **Preliminary.** As trust companies are vested with varied powers, some of them of a purely business nature and others of a purely trust or a *quasi-trust character*, all having a direct relation to legal matters, there is often the entrance or attempted entrance into the field of professional service or the pursuit of those callings, where not only is personal status to be considered, but where also personal qualifications are within the police power. In both aspects of this question there is necessary to be considered the moral responsibility of individuals independently of any relation of principal and agent. As an artificial creature of the law cannot act save through agents, more in these things than other things are we to be mindful of the axiom that a corporation has no soul, nor may it control the souls of its agents. There may be liability adjudged against a corporation according to theory of right and justice, but this must arise out of the direct mandate of law or on the principle *ex aequo et bono* as founded on contract or in violation of the rights of another. It is a different thing, however, for it to attempt to impose an agency relation where trust and confidence or skill and experience may be demanded by an individual or by the state.



**§ 124. A Corporation Not a Person So Far As Licensed Professions Are Concerned.** The right to practice law or medicine, does not embrace a corporation. "While a corporation is in some sense a person, and for many purposes is so considered, yet it is not such a person as can be licensed to practice medicine."<sup>1</sup> And, further, one licensed to practice either profession is "much more than an agent." As to an attorney at law it has been said: "He is an officer of the court, holding his commission in this state, from two of the members of this court, and subject to be disbarred by this court for what our statute calls 'mal-conduct in his office.' He is appointed to assist in the administration of justice, is required to take an oath of office and is privileged from arrest while attending courts."<sup>2</sup> He also must be certified to as to his moral character.

Where a statute authorizes the formation of a corporation "for any lawful business," it is said: "This means a business lawful to all (persons) who wish to engage in it."<sup>3</sup> But a corporation is not one of such persons, because "the practice of law is not a business to all, but is a personal right, limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study, both general and professional, and a thorough examination by a state board appointed for that purpose. \* \* \* It is not a lawful business except for members of the bar who have complied with all the conditions

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1. *State Electro-Medical Institute v. State* (1905), 74 Neb. 40, 103 N. W. 1078, 12 A. & E. Ann. Cas. 673.

2. *In re Bradwell* (1869), 55 Ill. 535, 537. Affirmed 83 U. S. 130.

3. *Matter of Co-operative Law Co.* (1910), 198 N. Y. 479, 483, 92 N. E. 1532 L. R. A. (N. S.) 55.

required by statute and the rules of the courts. As these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in. As it cannot practice law directly, it cannot indirectly by employing competent lawyers to practice for it, as that would be an evasion which the law will not tolerate.”

In this case it was also said that: “A corporation can neither practice law nor hire lawyers to carry on the business of practicing law for it any more than it can practice medicine or dentistry by hiring doctors or dentists to act for it,” citing cases in the note.<sup>4</sup>

The words “any person” in a statute regarding the practice of dentistry do not embrace a corporation.<sup>5</sup> It was said: “The company cannot be examined as to fitness, and therefore it cannot exhibit a license \* \* \* and to say that a corporate body cannot be examined in respect of qualifications to practice dentistry is only saying that the act necessarily contemplated natural persons only.” Generally it may be said that wherever a statute requires persons to be licensed to carry on a business, corporations are not embraced.<sup>6</sup>

It may be said then, that generally it is contrary to public policy that a corporation should be allowed to practice law.

**§ 125. Statutes Regarding Practice of Law by Corporations.** Although it generally has been held that a corporation can neither practice law nor

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4. *People v. Woodbury Dermatological Inst.* (1908), 192 N. Y. 454, 85 N. E. 697; *Hannon v. Siegel-Cooper Co.* (1901), 167 N. Y. 244, 60 N. E. 597, 52 L. R. A. 429.

5. *Com. ex. rel. v. Alba Dentist Co.* (1904), 13 Pa. Dist. Rep. 432.

6. *Crall v. Com.* (1905), 103 Va. 855, 49 S. E. 1038; *Standard Oil Co. v. Com.* (1900), 107 Ky. 606, 55 S. W. 8.

medicine, yet, especially as to the former, it has been found necessary to supplement public policy by making such practice *malum prohibitum*. This legislation hardly needs that the act denounced be considered *malum in se* to sustain it, because apart from that, it is clearly within the police power of the state in the guarding of the administration of justice or the protection of the public welfare.

The most notable of such legislation is a New York statute of 1909. Since its enactment it frequently has come before the courts for construction. Its specification of the things made unlawful for a corporation to do in the way of practicing law is very useful as a guide in other states, where corporations may have sought to make a business of representing others through their agents before the courts or in supplying legal advice or services to others for a consideration.<sup>7</sup>

This statute (Penal Law, § 280, Laws 1909, ch. 483, amended by Laws 1911, ch. 317, 1913, ch. 254 and 1916, ch. 254) is subdivided into various parts as follows: (1) To practice or appear as an attorney for any person than itself in any court or before any judicial body; (2) to make it a business to practice as an attorney at law for any person than itself in any court; (3) to hold itself out to the public as being entitled to practice law; (4) to render or furnish legal service or advice; (5) to furnish attorneys or counsel; (6) to render legal services of any kind in actions or proceedings of any nature; (7) in any other manner to assume to be

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7. See also "Unlawful Practice Act," Missouri Session Laws, 1915, and comment thereon in 81 Central Law Journal 4.

entitled to practice law; (8) to assume, use or advertise the title of lawyer or attorney at law or equivalent terms so as to convey the impression that it is entitled to practice law, or to furnish legal advice, service or counsel; (9) to advertise that it has, owns, conducts or maintains an office for the practicing law or for furnishing legal advice, services or counsel, and (10) to solicit claims for suit or of representing an attorney at law to any one sued or about to be sued or affected by any suit or proceeding.

In construing the terms of this statute the disposition of New York courts is to refer back to the principles laid down in the Co-operative Law Company case, *supra*, and to forbid corporations, not only practicing law, but also from holding themselves out to the public as having the right to practice law, or as being associated with any individual in his capacity as an attorney at law.

Just here in order to understand the common law standing of an attorney to the courts it is well to recite a statute in force in England at the time of our Declaration of Independence.<sup>7</sup> By this statute it is declared "that if any sworn attorney or solicitor shall permit or suffer his name to be any ways made use of upon the account or for the profit of any unqualified person or persons, thereby to enable him or them to appear, act or practice in any respect as an attorney or solicitor, knowing him not to be duly qualified, \* \* \* every such attorney or solicitor so offending shall be struck off the roll \* \* \* and \* \* \* it shall be lawful for the said court to commit such unqualified person so

7. 22 Geo. 2, Ch. 46, Sec. 11.

acting or practicing to the prison of the said court for any term not exceeding one year."

There is no reason to suppose that this statute did not become a part of our common law. It was ruled to be of force in Canada, notwithstanding that as to England it had been repealed by 6 and 7 Vict., Ch. 73. <sup>8</sup>This case showed an agreement between an attorney and an articled clerk, whereby the latter was to be admitted to partnership with the former after being admitted to practice, the profits of the business to be computed from the beginning of his services as clerk, there being a disagreement between the two, they separated, and the clerk sued for his interest in such profits. Plaintiff was denied recovery because of the illegality of the agreement.

In an English case an attorney engaged a certified conveyancer to conduct his business and allowed him a share of the profits instead of a salary.<sup>9</sup> There was a rule against both and it was made absolute, striking Jackson off the roll and committing Wood to prison for one month. The facts in this case make it greatly resemble what a corporation practicing law would do. It was said: "Wood received instructions from the clients and suits were instituted and carried on in consequence of such instructions." Jackson was charged with "having acted as the agent of Wood, a person not duly qualified to act as an attorney, and having permitted his name to be made use of, on account of and for the profit of Wood, knowing him not to be duly qualified."<sup>10</sup>

It would seem reasonable, therefore, to conclude

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8. *Dunne v. O'Reilly* (1862), 11 U. C. C. P. 404.

9. *In re Jackson and Wood*, 1 Barn., etc., 269.

10. See also, *In re Clark et al.*, 3 Dowling & R. 260.



that no statute is needed to make it an offense on the part of an unlicensed person to have any agreement with a qualified attorney or solicitor to practice law. The English statute, however, undoubtedly was aimed at natural persons and, while it may have been broad enough to call for disbarment of any qualified attorney or solicitor having such agreement with a corporation, plainly there was need for punishment of the corporation. The rule of policy declared by this statute and incorporated in our common law is just as much offended by an attorney or solicitor having an agreement with a corporation that must be carried out by its agents as it would be were the agreement with the agent themselves. In such case the corporation is but the representative of the agents instead of the other way about. The corporation's name, therefore, is merely the legal entitling of an aggregation of individuals, and as any one, whether a licensed attorney or not, may join this aggregation, it is denounced by the statute.

But as said above, we hark back to common law principles to construe the meaning of statutory terms forbidding corporations to do the things specified thereby. Therefore a very recent ruling by New York Supreme Court in Appellant Division as to what constitutes the practice of law is very interesting indeed, this ruling being under the statute forbidding the practice of law by corporations.<sup>11</sup>

The case concerned the representation of creditors in bankruptcy proceedings, matters in which it forcibly could be claimed that there was merely a business prop-

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11. *Meisel & Co. v. National Jewelry Board of Trade* (1915), 152 N. Y. Supp. 913. See also opinion of the Judge of a trial court of Kentucky in *Grocers' and Merchants' Bureau (a corporation) v. Gray* (1915), *American Legal News* for March, 1915, p. 38. That corporations engaged in securing tax reductions are unlawfully engaged in the practice of law, see *Peo. v. Purdy* (1916), 162 N. Y. Supp. 56 and 162 N. Y. Supp. 70.



osition coming up in every day life, and where forms to be followed and the exercise of good business judgment came very much more into play than any need of legal learning. These things might be thought particularly to concern collection agencies, formal presentation of claims, and, there being no possible conflicting interests between creditors of each class, it was in furtherance of the working of an administrative law that creditors be at liberty to select a common agent.

The court relied on decisions showing what constituted practice of the law, and having ascertained that, it pronounced judgment accordingly.

Thus it cited a case where the question was whether a disbarred attorney was practicing law while disbarred,<sup>12</sup> and there it became of importance to define the practice of law. It was said: "According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings and other papers incident to such actions and proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyances, the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law."

By the United States Supreme Court,<sup>13</sup> it is said generally, that: "Persons acting professionally in legal formalities, negotiations or proceedings by the warrant or authority of their clients may be regarded as attorneys at law within the meaning of that designation as employed in this country."<sup>14</sup>

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12. *In re Duncan* (1909), 83 S. C. 183, 189, 65 S. E. 210.

13. *Nat. Savings Bank v. Ward* (1880), 100 U. S. 195, 25 L. ed. 621.

14. See also Thornton on "Attorneys at Law," Sec. 69.

In Indiana,<sup>15</sup> it was said that: "In a large sense it (the practice of law) includes the legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matters may not be pending in a court." Certainly it would seem that no rule of construction in a narrow way could be applied successfully, where there is express prohibition against an institution for the commission of an act that is *malum in se*. Such construction would offend a well known rule in regard to statutes in furtherance of common law principles.

The above decisions are not only useful for what they directly decide, but for what they imply, especially that we must resort to the common understanding of what the practice of law is in construing statutes regulating the qualifications of attorneys. Apparently a corporation in preparing legal documents, especially such as wills, and advertising that estates may obtain, through their lawyer agents, all the expert knowledge required in their management, places both them and their agents in the predicament of violating the law, the corporation by force of the statute, amendatory of the common law rule, and the agents as violating the common law rule itself.

It is to be said also that this case holds that so far as federal courts are concerned, their rules forbid the practice of law therein except by those who are entitled to practice law in state courts, except that by comity an attorney of another state or county may be permitted to appear in special cases before the court.

**§ 126. Agreements by Attorneys with Unqualified Persons a Common Law Offense.** I have

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15. Eley v. Miller, 7 Ind. App. 529, 535, 34 N. E. 836.

cited Statute 22 George II., Ch. 46, which became a law in 1760, to show that agreements of attorneys and solicitors with unqualified persons in the practice of law constituted a common law offense in the absence of statutes specifically covering what was provided for by the English statute. But it may be said, this is only true as to those of our states which adopt as part of our common law, such English statutes, applicable, or rather not unsuitable, to our conditions as they existed at the time of our separation from the mother country. Both by statute and decision there is variance as to this, many, if not the majority of states, fixing an anterior time, to-wit: the fourth year of the reign of James I.

Of the states adopting the common law, but not specifying the date from which the written and unwritten law of England ceased as new law to govern us, and taking the line of demarcation to be July 4, 1776, there are Florida,<sup>16</sup> seemingly Delaware,<sup>17</sup> Maryland,<sup>18</sup> New Mexico,<sup>19</sup> Rhode Island,<sup>20</sup> and Nevada.<sup>21</sup> Other states speak of laws of England in force at the time of our emigration, and generally they place this date at 1607, that is to say, the fourth year of James I.<sup>22</sup> The citations I make are not exhaustive, but are used illustratively. The New York constitution<sup>23</sup> fixed April 19, 1775, as the line of demarcation, which date would not exclude the act in the twenty-second year of the reign of George II.

16. Fla. R. S. 1892, Sec. 59.

17. *Clawson v. Primrose* (1873), 4 Del., Ch. 643, 653.

18. *Dashiell v. Atty. General* (1822), 5 Harr. & J. 392, 9 Am. Dec. 572.

19. *Browning v. Browning* (1886), 3 N. M. 371, 9 Pac. 677.

20. R. I. Gen. Stat. (1896), Ch. 297, Sec. 3.

21. *Hamilton v. Newland* (1865), 1 Nev. 40.

22. *Hardage v. Stroop* (1893), 58 Ark. 303, 307, 24 S. W. 490; *Chilcott v. Hart* (1894), 23 Colo. 40, 45 Pac. 391, 35 L. R. A. 41; *Kreitz v. Behrensmeyer* (1894), 149 Ill. 496, 36 N. E. 983, 24 L. R. A. 59; *Holloway v. Porter* (1874), 46 Ind. 62; *Sattig v. Small* (1862), 1 Kan. 165; *Baker v. Crandall* (1883), 78 Mo. 584, 47 Am. Rep. 126.

23. N. Y. Const. Art. 1, Sec. 16.

To ascertain then whether the policy declared by this statute inhered in English law at the time of the settlement of Virginia in 1607, would seem to be important, along with consideration whether that policy was applicable to our condition.

The year prior to this time,<sup>24</sup> it was provided that "none should from thenceforth be admitted attorneys, in any of the King's courts of record at Westminster, but such as had been brought up in the same courts, or otherwise well practiced in soliciting causes; and had been found by their dealings to be skillful and of honest dispositions."

In Tidd's Practice 35 it is stated that: "In confirmation of this statute, a rule of court was made, that none should be admitted an attorney of this (King's) court, unless he should have served, by the space of five years, as a clerk to some judge, sergent-at-law, practising counsel, attorney, clerk or officer of one of the courts at Westminster; and were also, on examination, found of good ability and honesty for such employments." This author then recites that matters stood thus until the statute of George II., of which I have above spoken. It may successfully be urged, that there would be no common law offense in this country and in a state where the rule is that our common law is only such as applied to our settlement as colonists, and not during colonial life, but scarcely may it be thought in accordance with usage and tradition, that an attorney could surrender his judgment and independence to another in the practice of his profession, or lower the confidence reposed in his skill and personality. Rather should it be thought that the Statute 22 George II., was intended to provide

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24. Stat. 3 Jac. I. C. 7.

a remedy against abuses, especially when the cases I have instanced indicate that procedure thereunder was summary and not by regular jury trial.

Thus it has been laid down that: "The court will, in general, interfere in this (a) summary way to strike an attorney from the roll, or otherwise punish him, for gross misconduct, not only in cases where the misconduct has arisen in the course of a suit, or other regular and ordinary business of an attorney, but where it has arisen in any other matter so connected with his professional character as to afford a fair presumption that he was employed in or intrusted with it in consequence of that character."<sup>25</sup>

In a rather early New York case,<sup>26</sup> there is a most interesting discussion of the admission of attorneys to the bar, and it is recited that beginning with a statute in the fourth year of the reign of Henry IV, more than 200 years prior to the settlement of Virginia, and again in the third year of the reign of James I, also prior to this time, English law controlled this subject. In this case, that these old statutes were looked to to ascertain the rights and privileges, qualifications and character of attorneys, also well appears from a discussion by our federal supreme court.<sup>27</sup>

We think, therefore, it cannot be doubted that as to all states recognizing our common law as embracing English statutes applicable to our condition at the time of our separation, it is a common law offense for an attorney to represent a corporation in the doing of legal business for a customer, and that according to the course of law prior to such statute, such representation is

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25. Archbold's Practice, Ed. by Chitty, p. 148.

26. Matter of Application of Cooper (1860), 22 N. Y. 67.

27. Ex parte Wall (1883), 107 U. S. 265, 27 L. ed. 552.



against the spirit of the common law, though very probably not indictable as such.

**§ 127. Attorney Appearing for Corporation Practicing Law Cannot Take Advantage of its Illegal Conduct.** An attorney retained by a corporation which had undertaken legal proceedings for third persons, was held<sup>28</sup> liable to account to the corporation. The court could not uphold the attorney "in his vindication of a law which he too broke, to the end that he should keep moneys which are not his own." This, of course, is but an application of the principle that no man shall profit by his own wrong. The court speaks of the New York statute against the corporate practice of law as constituting an offense *mala prohibita* and not *mala in se*, and the purpose and effect of this law to be "to preserve an ancient and honorable profession 'of the highest usefulness and standing,' one which 'involves the highest trust and confidence,' from the inroads of a legal entity that could neither qualify for practice nor discharge such personal obligations of trust and confidence, and which, acting as a middleman, so to speak, between client and attorney, might destroy the relation of client and attorney, or with its aggregated power, might affect the individual independence of the bar."

**§ 128. Distinction as to Corporation Furnishing Services to Attorneys at Law.** It has always been permissible for counselors and attorneys at law to employ an unlicensed person as an assistant or clerk. A corporation is therefore qualified to act in such a capacity, without question. When a trust company assists an attorney in drafting a will, in organizing or reorganizing a corporation, or in examining a title, it is but acting

<sup>28</sup> United States Title Guaranty Co. v. Brown (1915), 166 N. Y. App. Div. 688, 152 N. Y. Supp. 4708, affirmed in (1916) N. Y. 111 N. E. 828.



as his clerk. The company assumes no relation to the layman client. Counsel assumes the professional obligation of personal morals and learning involved. When he employs a corporation to assist him he but substitutes trained and organized for untrained and perplexed assistance. Recent legislation on this subject may therefore be regarded as merely confirmatory of the common law. It is useful, however, in clearing any doubts that may exist in the minds of those who look upon statutory enactments as all-embracing. An example of such confirmatory legislation is found in the amendment to Section 280 of the New York Penal Code enacted by the 1916 Legislature (Chap. 254, Laws of 1916). This amendment is as follows:

“Nothing herein contained shall be construed to prevent a corporation from furnishing to any person, lawfully engaged in the practice of the law, such information or such clerical services in and about his professional work as, except for the provisions of this section, may be lawful, provided, that at all times the lawyer receiving such information or such services shall maintain full professional and direct responsibility to his clients for the information and services so received. But no corporation shall be permitted to render any services which cannot lawfully be rendered by a person not admitted to practice law in this state nor to solicit directly or indirectly professional employment for a lawyer.”

From its “Act to Prohibit the Practice of Law by Corporations” (Chapter 292, General Acts, 1916), Massachusetts excepts corporations “lawfully engaged in assisting attorneys at law to organize corporations” as well as title companies. By the terms of this act banks and trust companies are permitted to give legal advice on investments and taxation.

## CHAPTER XVIII

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### External or Foreign Business

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§ 129. **In General.** The doing of business by a trust company at points other than at its home office encounters two classes of legislation, namely, laws of the domicillary state which limit the right to operate branch offices, and laws of foreign states or countries which deny or prescribe terms for the admission of foreign corporations.

The necessity of compliance with these laws rests upon the character of the activity contemplated or performed in the foreign state or country. The method of compliance will depend upon the laws themselves and the extent to which the company desires to operate abroad. It may be required to qualify as a foreign corporation generally, or under laws particularly applicable to trust or other fiduciary companies, or by furnishing security to a foreign court with reference to a particular trust, or it may operate through a domestic corporation whose stock it owns or indirectly controls.

All of these things turn, very largely, upon statutes. The purpose of this chapter is to discuss the principles involved. A guide for admission of foreign trust companies has been compiled in alphabetical order of the various states and is printed in the last pages of the appendix.

We are merely concerned in this work with the status of the fiduciary company, but it is interesting to note that a corporate client from a foreign state will not be "doing business" in the trust company's state by employment of the trust company. Thus it has been ruled that the making of a collateral trust mortgage does not bring the debtor corporation within the restrictions applicable to foreign corporations.<sup>1</sup>

As to formalities of proof in foreign states of right to act as fiduciary, see the case cited.<sup>1½</sup>

**§ 130. Prima-facie Presumption that Trust Company has the Power to Execute a Trust in a Foreign State.** In an action <sup>2</sup> brought by a New York trust company in possession of a railroad in Wisconsin, under mortgage foreclosure, to recover on a policy of insurance for the burning of a dredge boat fastened to the wharf of the railroad company, the capacity of the trust company to take such a trust was attacked. Of this the court said (*italics supplied*):

"The act of incorporation fully authorizes a trust created by deed such as this was. Whether they could hold real estate in Wisconsin would depend on the statutes of that state. *In the absence of any proof of a law to the contrary, we must presume that the company had authority to execute the trust, which by their charter they had power to undertake.*"

**§ 131. Branch Offices.** Legislation of the domiciliary state<sup>3</sup> or of the foreign state<sup>4</sup> may limit or prohibit the establishment of branch offices by a trust com-

1. Union Trust Co. of Rochester v. Sickles (1908), 125 N. Y. App. Div. 105, 109 N. Y. Supp. 262.

1½. Central Trust Co. of Illinois v. Hearne (1916), West Virginia, 88 S. E. 450.

2. Farmers' Loan & Trust Co. v. Harmony Fire and Marine Ins. Co. (1868), 51 Barb. 33, affirmed without opinion in 41 N. Y. 619.

3. Sec. 195 New York Banking Law, Appendix page 302.

4. Sec. 223 New York Banking Law, Appendix page 326.

pany. Power to establish such offices, however, may be implied, in the absence of restrictive statutes.

Thus with respect to the Freedman's Savings and Trust Company, incorporated in the District of Columbia under act of Congress, and which had established branches in various states, it was held<sup>5</sup> that:

"The corporation thus created might well do business, under the comity of nations, in any state in the Union in which the business was in other respects lawful." It was the further opinion of the court that there was no reason why depositors of the Nashville branch could not bring action in the state courts upon insolvency of the company.

The corporation being a nonresident, it might be proceeded against by attachment. The several branches are not considered as distinct, so that a claimant is limited to the assets of a particular branch.<sup>6</sup> As to the powers of the manager of a trust company branch, see the case cited.<sup>6½</sup>

**§ 132. Exclusion of Foreign Trust Companies**  
—Need of Special Laws for Admission in Some States. The Supreme Court of Errors of Connecticut has held<sup>7</sup> that as foreign corporations could not be admitted to do business in that state for purposes not permitted to domestic *business* corporations, and domestic corporations could not be organized to transact the business of an executor or administrator unless "as incident to the business of a trust company," it followed that a foreign

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5. *Hadley v. Freedman's Savings and Trust Co.* (1874), 2 Tenn., Ch. 122.

6. *First Nat. Bank v. Union Trust Co.* (1913), Tex. Civ. App., 155 S. W. 989.

6½. *Union Savings & Trust Co. of Seattle v. Krumm*, Wash., 152 Pac. 681.

7. *Farmers' Loan and Trust Co. of N. Y. v. Smith* (1902), 74 Conn. 625, 51 Atl. 609. But see legislative change since this decision in Appendix *post*.

trust company could not act as an executor in that state.

Mandamus by a mortgage company organized under the banking laws of New York to compel the Secretary of the State to issue a certificate entitling it to do business in Michigan, was also denied.<sup>8</sup> Although the corporation involved in this case was not a trust company, the language used by the Michigan Supreme Court would seemingly include foreign trust companies in the class to which admission would be denied. It said that "banking corporations and those corporations which are within the contemplation of our banking laws are not within the provisions of the act authorizing foreign corporations to transact business in this state."

Michigan trust companies are organized under laws relating exclusively to trust, deposit and security companies.<sup>9</sup> Official supervision and control was provided for them, but not for foreign corporations of the class seeking qualification. To admit this foreign corporation by mere compliance with the general foreign corporation laws would, in the opinion of the court, give the foreign corporation an unfair advantage, and operate as an imposition upon the citizens of Michigan.

A New York case<sup>10</sup> held that a foreign trust company was not authorized to act in fiduciary capacities, in the mere absence of prohibitive legislation. The court said:

"It seems almost like impugning the intelligence of the Legislature to presume that it intended—by the absence of prohibition alone—to allow all foreign trust

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8. *New York Mortgage Co. v. Secretary of State* (1907), 150 Mich. 197, 114 N. W. 82.

9. Act 108, 1889, as amended.

10. *Matter of Avery* (1904), 45 N. Y. Misc. 529, 92 N. Y. Supp. 97: Since the rendition of this opinion the New York law has been amended so as to provide for admission of foreign trust companies as executor or trustee under a will. N. Y. Banking Law, Sec. 223, Appendix page 326.



companies, with the measure of their liabilities and responsibilities fixed by the laws of their own creation, to come in here and demand as a matter of right, authority to execute such trusts, because to do so, if the position of counsel is correct (that they have such right without complying with our statutes to enable them to do business in this state as foreign corporations), it enables them to come here and execute such trusts without obtaining permission from our state authorities, without designating any person upon whom process may be served; without maintaining any office or having an office located here; without subjecting itself to the visitatorial powers or the power of control of any state department, and without safeguarding the rights of our citizens in any manner save by giving a bond, which, with doubtful authority may be ordered by the court, and when clothed with authority to act by the court, to take itself and the property of the estate committed to its care to its own domicile beyond the jurisdiction of the court."

**§ 133. Mere Acceptance of Mortgage Trusteeship Without Action Under Trust Deed Not Doing Business in Foreign State; Taking Possession of Property and Operating It Might Require Qualification.** In a case <sup>11</sup> before the United States Circuit Court for the Northern District of Alabama, an attempt was made to defeat an action by a New York trust company to foreclose a trust deed on an Alabama railroad, on the ground that the trust company had not qualified in Alabama as a foreign corporation. The statute in question read as follows:

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11. *American Loan & Trust Co. v. East & West R. Co.* (1889), 37 Fed. 242. See also *Continental Trust Co. v. Tallassee Falls Mfg. Co.* (1915), 222 Fed. 694, and *Martin v. Bankers Trust Co.* (1916), Ariz., 156 Pac. 87.



“No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein; and such corporation may be sued in any court where it does business by service of process upon an agent anywhere in this state.” Of the plea seeking to defeat the action, the court said:

“This plea does not aver specifically that the American Loan and Trust Company is doing business in the state of Alabama, but avers that it is a foreign corporation, has accepted the trust from the East & West Railroad Company of Alabama, and has no known place of business nor authorized agent within the state; the inference seeming to be that the said company is doing business in this state, because it has accepted the trust under the trust deeds issued by the East & West Railroad Company. It is to be doubted much whether the transaction of its legitimate business in the city and state of New York, on the part of the American Loan & Trust Company, is doing business in Alabama, in the sense of the constitutional article, when it accepts a trust thereafter on a contingency to be executed in Alabama. The provisions of the trust deed, which is made the basis of the foreclosure suit, do not indicate that any business is to be transacted in Alabama by the trustee, unless default shall be made in the payment of interest, as provided by the trust deed. In case of default, the trust deed provides several lines of procedure upon the part of the trustee in the execution of his trust. One is that the said trustee may enter into possession of the said railway line and property, and manage and operate the same for the account of the bondholders, and apply the proceeds of such management to the payment of interest on the mortgage debt. Perhaps, if this provision of the

trust deed shall be acted upon, and the trust company shall take possession of the railway line and operate the railway, the trust company would then be doing business in Alabama, and would then be compelled, in compliance with the constitutional article, to provide at least one known place of business and one authorized agent.”

The Supreme Court of Wisconsin has also decided that a trust company is not “transacting any business in that state, by passively continuing to hold a previously existing and valid lien or title. Such passivity is the negation of transaction of business.”<sup>12</sup> And in Illinois it was held that certifying to the bonds by a New York Trust Company at its home office and bringing suit for foreclosure in Illinois was not the assumption of an active trust in that state so as to come within the statute. It was said that: “The trust deed in this case provides for active duties in the execution of the trust—such as taking possession of the property, managing and operating it, collecting rent and income, and selling it; but the trustee never assumed to exercise the active trusts and powers attempted to be conferred.”<sup>13</sup>

**§ 134. Right to Sue Without Qualifying in Foreign State. Individual and Fiduciary Capacity.** Merely prosecuting or defending suits in a foreign state do not constitute “doing business” therein, so as to bring the conventional corporate plaintiff or defendant within the penalties and prohibitions of foreign corporation laws, because this is not the “ordinary” business for which such corporations are created,<sup>14</sup> nor is it a right which is dependent for its existence “upon authority to

12. *Chicago Title & Trust Co. v. Bashford* (1904), 120 Wis. 281, 97 N. W. 940.

13. *Morse v. Holland Trust Co.* (1900), 184 Ill. 255, 56 N. E. 369.

14. *Alpena Portland Cement Co. v. Jankins & Reynolds Co.* (1910), 244 Ill. 354, 91 N. E. 480. See *Martin v. Bankers' Trust* (1916), Ariz., 156 Pac. 87.

transact or engage in any particular business.”<sup>14</sup> This reasoning would apply to a trust company when suing or defending in its own behalf, but when it brings or defends litigation for others, it is transacting business for which it is created, though this may not be regarded as “ordinary” business. It is the performance of service for which it may charge. It is exercising rights dependent upon its special powers, since the ordinary corporation could not bring or defend litigation for *cestui que trustent*.

However, the very fact that the trust company was acting for others, i. e., individual bondholders, who were themselves not subject to the disqualification imposed by the foreign corporation law, was regarded as sufficient to excuse the corporate trustee from qualifying in a Texas foreclosure suit.<sup>15</sup> The court said: “It cannot be successfully contended that the bondholders would not be permitted to bring this action in their names. And, this being true, we know of no sound reason which would prevent their bringing it in the name of the trustee for their benefit.” The Supreme Court of Wisconsin<sup>16</sup> has held that the “mere commencement and prosecution” of a mortgage foreclosure suit is not the transacting of business in the forbidden sense. But the process of reasoning by which this conclusion is reached does not appear outside of the citation of cases holding that litigation in its own behalf is not the “doing of business” by corporations generally.

When trust companies sue as statutory assignees,<sup>17</sup>

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15. *Commercial Telephone Co. v. Territorial Bank & Trust Co.* (1905), 38 Tex. Civ. App. 192, 86 S. W. 66.

16. *Chicago Title & Trust Co. v. Bashford* (1904), 120 Wis. 281, 97 N. W. 940. See also *American Loan & Trust Co. v. East & West R. Co.* (1889), 37 Fed. 242, and *Morse v. Holland Trust Co.* (1900), 184 Ill. 255, 56 N. E. 369.

17. *Royal Trust Co. v. Harding* (1912), 78 N. Y. Misc. 309.

they are entirely dependent upon the comity of the courts in which they appear, but in this regard they are not different from individuals acting in like capacities.

**§ 135. Complying with Local Laws. Deposit of Securities.** The Illinois supreme court ruled that when The Farmers' Loan & Trust Company of New York proposed to act in that state as a trustee with active duties to perform, it must comply with the local act requiring the deposit of securities.<sup>18</sup> The effect of this decision, as I understand it, is that even where a trust company may act in another state, though in a purely fiduciary capacity, it will be held to be doing business in the latter state because the law of its own state regards this as doing business and the local statute must exact for its own citizens the same measure of security as would be required thereunder. There would be security demanded from an individual offering himself as trustee and comity extends recognition to the foreign statute. The co-trustee of the Farmers' Loan & Trust Company was an Illinois corporation bearing title, "American Trust and Savings Bank," and the laws of Illinois are spoken of as those "in relation to trust companies."

As perhaps sufficient on this subject is a case by the Supreme court of the District of Columbia.<sup>19</sup> The court speaks of an act of Congress in regard to "trust, loan, mortgage and certain other corporations within the District of Columbia" and their becoming executors, administrators, guardians or trustees, without the execu-

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18. *Farmers' Loan & Trust Co. v. Lake St. El. R. Co.* (1898), 173 Ill. 439, 51 N. E. 55, reversed in 177 U. S. 51, 44 Law Ed. 667, 20 S. Ct. 564, because jurisdiction had first attached in the federal court. See also *Penn. Co. for Insurance on Lives v. Bauerle* (1892), 143 Ill. 459, 33 N. E. 166.

19. *Re Margaret Turley* (1891), 9 Mackey (20 D. C. Repts.) 315.

tion of a bond. This act speaks of no bond being "required from any trust company incorporated under this act." The court held that "when they came under this law they surrendered their powers and authority derived under their original incorporation," and must comply with the local act before acting in any fiduciary capacity.

**§ 136. Foreign Trust Company Qualifying as Executor by Giving Bond and Appointing Agent for Service of Process with Respect to a Particular Estate.** Upon petition by executors of a New Jersey estate to the Court of Chancery of New Jersey, for the appointment of a new trustee in the place of a Pennsylvania trust company appointed by the will, the vice-chancellor held:<sup>20</sup>

"The question propounded is not whether this court will appoint this corporation as a trustee, but whether it will say that the trustee selected by the testator shall be set aside, and the trust committed to another, upon the single ground that the trustee is a foreign corporation. It is said, in support of the petition, that this court will have no jurisdiction over the trustee or over the fund, should they be paid over to the foreign corporation. It is also said that that corporation has no right to execute the trust within this state. I see no difficulty in providing for the retention of jurisdiction sufficient to secure the execution of the trust; for the corporation tenders itself ready to give security for the due performance of its trust in this state. Nor do I see that the execution of the trust cannot be performed by the corporation. The duties of the trustee consist merely in the paying over of sums of money which can be either paid in Pennsylvania or in this state.

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20. *In re Satterthwaite's Estate* (1900), 60 N. J. Eq. 347, 47 Atl. 227.



My conclusion is that the Guaranty Trust & Safe-Deposit Company shall execute and file a bond, made to the chancellor of the state of New Jersey, with a New Jersey corporation, qualified to act as sureties, as surety; which bond, in addition to the ordinary conditions of such a bond, shall contain a condition that, whenever an order shall be served upon the foreign corporation to account before the orphans' court of Burlington county, the court of chancery, or the prerogative court of this state, it will obey such order by filing its account, and by producing any and all vouchers or securities in its possession, belonging to such trust estate, before said court, or before a master appointed by the said court, to make and state an account of the same, and obey all orders of the said court in respect of said trust; also that the New Jersey corporation so signing as surety shall be the agent of the trustee to receive and accept service of all notices and orders in respect of said trust."

**§ 137. Effect of Non-compliance by Trustee upon Validity of the Trust.** Restrictive legislation upon the rights and powers of foreign trust companies go to the qualification of the company to accept and perform the trust in question and do not affect the validity of the instrument as a whole. Equity never allows a trust to fail for want of a qualified trustee, and it will not hold a trust invalid because the trustee is in default. These general principles have been applied in several cases where trust companies acting as mortgage trustees have failed to comply with foreign corporation laws.<sup>21</sup> In such cases, the proper remedy is removal of the disqualified trustee, and the appointment of a new trustee

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21. *Hervcy v. Illinois Midland Ry. Co.* (1884), 28 Fed. 169; *Farmers' Loan & Trust Co. v. Chicago & M. P. R. Co.* (1895), 68 Fed. 412; *Morse v. Holland Trust Co.* (1900), 184 Ill. 255, 56 N. E. 369. See also *Martin v. Bankers' Trust Co.* (1916), *Ariz.*, 156 Pac. 87.



under provision in the trust deed, or in the absence of such provision, by the court.<sup>22</sup>

**§ 138. Jurisdiction over Fund Held by Domestic Trust Company under a Will Proved in a Foreign State.** In an action<sup>23</sup> brought in the Supreme Court of New York by the Farmers' Loan & Trust Company of New York for a judicial settlement of its accounts as trustee under the will of a resident of South Carolina, which had been probated in that state, it was held by the Appellate Division, First Department, that:

"The trust fund and its administration being here, the trustee being a corporation of this state, and the court having obtained jurisdiction of the parties, it may properly exercise jurisdiction and direct how the fund shall be distributed and its decree, when complied with by the plaintiff, will relieve it from further liability. (Cross v. U. S. T. Co., 131 N. Y. 330.)"

The case thus cited involved an<sup>24</sup> action brought to have a testamentary deposition held invalid as violating the rule of New York against perpetuities. The will of a resident of Rhode Island, which was probated in that state, appointed a New York trust company as trustee of certain personal property for the benefit of residents of New York. The principal point decided in the case was that as the will was valid according to the laws of Rhode Island, an action was not maintainable in New York to have it declared invalid. With relation to the capacity of the trustee, the court remarked:

"It may be doubted whether the corporate powers

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22. *Morse v. Holland Trust Co.* (1900), 184 Ill. 255, 56 N. E. 369; *Farmers' Loan & Trust Co. v. Lake St. El. R. Co.* (1898), 173 Ill. 439, 51 N. E. 55.

23. *Farmers' Loan & Trust Co. v. Ferris* (1901), 67 N. Y. App. Div. 1, 73 N. Y. Supp. 475.

24. *Cross v. United States Trust Co.* (1892), 131 N. Y. 330, 30 N. E. 125, 15 L. R. A. 606, 27 Am. St. Rep. 597.

conferred upon the trustee in this case are broad enough to authorize it to execute a trust created as this was. (Laws 1853, ch. 204; Laws 1863, ch. 60.) But though that question has come in, incidently, on the argument, it is not properly before us. This is not an action to remove the trustee. There is no allegation in the complaint that it is incompetent to act and no relief is asked on that ground. There is no finding or request to find on that subject. The want of corporate capacity in the trustee to act would not be fatal to the trust. The proper court would not allow the trust to fail because the trustee is disabled, but would appoint a new one.”

**§ 139. Restrictive Statutes not Retroactive.**

Prohibitions against foreign trust companies holding or disposing of property in a trust capacity apply only to property acquired or business transacted subsequent to their enactment.<sup>25</sup> A contrary construction of such laws would render them confiscatory and in contravention of the Fourteenth Amendment to the Federal Constitution, forbidding the deprivation of property without due process of law.<sup>26</sup>

**§ 140. Service of Process upon Director of Foreign Trust Company.** In an action<sup>27</sup> brought in New York against a foreign trust company, as executor and trustee under the will of a resident of Washington, D. C., it appears that summons was served upon a director of the trust company in New York. Of this the court said:

“The service is sought to be sustained by virtue of

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25. *Fidelity Trust Co. v. Washington Oregon Corporation* (1914), 217 Fed. 588; *Chicago Title & Trust Co. v. Bashford* (1904), 120 Wis. 281, 97 N. W. 940.

26. *Chicago Title & Trust Co. v. Bashford* (1904), 120 Wis. 281, 97 N. W. 940.

27. *Hansen v. American Security & Trust Co.* (1913), 159 N. Y. App. Div. 801, 144 N. Y. Supp. 839.

the provisions of Section 1836a of the Code of Civil Procedure, which appear to give our courts jurisdiction in actions by or against a foreign administrator or executor. Service on one of the directors of the appellant, however, is only authorized by Section 432, subd. 3, of the Code of Civil Procedure, which provides that it may be so made if a designation of a person upon whom service may be made, filed by the corporation pursuant to the provisions of Section 16 of the general corporation law is not in force, or, if the person so designated or an officer specified in subdivision 1 of that section cannot be found the exercise of due diligence, and 'the corporation has property within the State, or the cause of action arose therein.' "

No attempt was made to show that the defendant had any property in the State, and the plaintiff failed to satisfy the court that the cause of action arose in New York. The motion to vacate the service was granted.

**§ 141. Continuance of Authority of Agent for Service of Process after Withdrawal from State.** In *Yeomans v. Minnesota Title Insurance & Trust Co.*,<sup>28</sup> it appears that a Minnesota trust company, having its principal place of business in Minneapolis, sold mortgages through an agent in Boston, whom they compensated by commission. Upon the representation of this agent that it was necessary from a legal point of view, the trust company filed in the office of the commission of corporations for the commonwealth of Massachusetts an "Appointment of Attorney for the State of Massachusetts" and a "Foreign Corporation's Certificate." The question in the case was whether the trust company could be sued in Massachusetts by a citizen of New York after

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28. (1895), 67 Fed. 282.

it had withdrawn from the State. It was held that the appointment of attorney for acceptance of process survived the withdrawal of the company from the State as long as any liabilities remained outstanding in Massachusetts and that nonresidents could avail themselves of the same legal remedies thereunder as citizens of Massachusetts.

## CHAPTER XIX

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### Trust Company Officers

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§ 142. Impersonation of Trust Company by its Officers. Its officers are not merely agents of a trust company. They are the company itself. We have seen that "Its conscience is their conscience" and that therefore a Trust Company would not be heard to say that it was not affected by knowledge of its president of a fraud he had perpetrated on another company making it insolvent and unreliable as a place of deposit by the company, of money belonging to an estate held by it as an administrator.<sup>1</sup>

In a case where a member of the board of directors of a trust company purchased property, through a third person, which the trust company was employed to sell as trustee, the Court said:<sup>2</sup> "Under the trust which was assumed by defendant corporation, it became the duty of that corporation to find an advantageous purchaser of the property of its *cestui que trust*. As that corporation could only act through its board, that duty necessarily belonged to the board and to each member of the

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1. See section 18 citing *Germania S. V & Trust Co. v. Driskill* (1902), 23 Ky. L. Rep. 2050, 66 S. W. 610.

2. *Purchase v. Atlantic Safe Deposit & Trust Co.* (1913), 81 N. J. Eq. 344, 87 Atl. 444, affirmed on opinion below in 83 N. J. Eq. 353. See also *Gay v. Young Men's Consol. Co-Op. Mercantile Inst.* (1910), 37 Utah 280, 107 Pac. 237.

board. In finding a purchaser for the trust property, a member of the board did no more than perform his plain duty as a director—a duty which he owed alike to the corporation and to the *cestui que trust* of the corporation which he was representing. The corporation and the *cestui que trust* were alike entitled to the service which was performed by the director, and were alike entitled to the free exercise of the judgment of the director touching the desirability of the sale, uninfluenced by hope of personal gain, for the relation of the board to the *cestui que trust* was clearly in the nature of a trust relation, notwithstanding the fact that the corporation which the board primarily represented was the legal trustee.”

And likewise it is held that a statute respecting trust companies, extends to its board of directors and to each director “separately and individually,” for it would be idle and vain unless the legislature in directing the corporate body, acting wholly by its directors, to do a thing required, or not to do a thing prohibited, meant that the directors should not make or cause the corporation to do what was forbidden, or omit to do what was directed.<sup>3</sup>

**§ 143. Duties of Directors — Liability for Neglect—Distinction as to Executive Committee.** The duties of trust company directors were thus summarized in a New York case:<sup>4</sup>

“If the by-laws require monthly meetings they must make diligent effort to be present thereat. They must give their best efforts to advance the corporation, both by advice and counsel and by active work on behalf of the corporation when such work may be assigned to them. If at their meetings, or otherwise, information should

3. *People v. Knapp* (1912), 206 N. Y. 373, 381, 99 N. E. 841.

4. *Kavanaugh v. Gould* (1911), 147 N. Y. App. Div. 281, N. Y. Supp. overruling 64 N. Y. Misc. 303, 118 N. Y. Supp. 758.



come to them of irregularity in the proceedings of the bank they are bound to take steps to correct those irregularities. The law has no place for dummy directors. They are bound generally to use every effort that a prudent business man would use in supervising his own affairs, with the right, however, ordinarily to rely upon the vigilance of the executive committee to ascertain and report any irregularity or improvident acts in its management."

The Court partly justified this exception as to a right of reliance upon an executive committee, on the grounds that it is not practical to commit supervision of detail to a large directorate (twenty-five in the case at bar), that a smaller number would do the work more efficiently and that responsibility would be greater because not so scattered. It then explained that the busy business men, whose membership was desirable upon the trust company boards, would not accept the position, if they were answerable for the neglect of the executive committee, and that the corporation "could not afford to loose them."

This reasoning appears to me to be inconsistent with the conclusion arrived at by the Court. If a smaller number works more efficiently, the corporation should not have a large board of directors. To permit the corporation to trade upon the connection of men too busy with their own affairs to give proper attention to their duties as directors, merely because of the value of their advice in emergencies, and their "large business connections," is to allow the trust company to reap an advantage without a corresponding measure of responsibility.

The further ground for distinction between directors generally and members of the executive committee,

assigned by the Court, in this case, is more convincing, I think. This is that the New York Banking Law applicable to trust companies, provides that the directors may "designate an executive committee," to whom detailed information as to purchase and sales of securities and discounts and loans may be made.<sup>5</sup> Relying on this statutory provision, the Court said: "The necessary inference follows that the directors not upon the executive committee are not chargeable with knowledge of detail management, which need be reported only to the executive committee." The negligence complained of in this case related to loans and securities, and this statute was therefore applicable. Whether this right of reliance on an executive committee would extend to activities not recognized by the statute and particularly when they pertain to the strictly fiduciary capacities of a trust company was not an issue in this case. It was an action against directors to recover money lost to a trust company by reason of their alleged negligence. The liability of directors generally for losses caused by their negligence was recognized, but it was thought there was no negligence proven as to non-members of the executive committee, and that a member of the executive committee "was not negligent in taking a vacation while there were members of the executive committee sufficient to constitute a quorum at all times during the summer within reach."

A failure of directors to hold meetings must have caused the injury complained of, in order to be material in an action against them for negligence.<sup>6</sup> Directors

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5. As to right of directors to create an executive committee under express authority or by implication or usage, see *Maryland Trust Co. v. National Mechanics' Bank* (1906), 102 Md. 608, 63 Atl. 70.

6. *Chambers v. Land Credit Trust Co.* (1914), 92 Kan. 30, 139 Pac. 1178.

who had taken no active part in the management are not liable for a loss of trust funds.<sup>6½</sup>

It will be presumed that directors have made the examinations of a trust company's affairs required by statute.<sup>7</sup>

There is no criminal liability for negligence by trust company directors in New York, where there is no statute making it a crime, and according to the Penal Law of that State, no act or omission is a crime except as prescribed by statute.<sup>8</sup> It was further held that the statutory requirement of taking an oath to diligently and honestly administer the affairs of the corporation "is not the command by the legislature to thus administer them," so that an omission would come under the Penal Law. "The duty of taking an oath was prescribed by statute, but that duty the defendant performed. The duty of honest administration was not prescribed."

**§ 144. Authority of Officers.** The extent of authority of various trust company officers and liability of the corporation for their acts and omissions rest upon the same principles as those applicable to corporations generally.

Thus a trust company may confer upon its officers or agents powers not ordinarily belonging to them, by habitually permitting them to exercise them,<sup>9</sup> and it will be estopped from setting up the want of authority of offi-

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6½. *R. Dominion Trust Co.* (1916), 32 D. L. R. 63.

7. *Gregory v. Binghampton Trust Co.* (1915), N. Y. App. Div. 154, N. Y. Supp. 370.

8. *People v. Knapp* (1912), 206 N. Y. 373, 99 N. E. 841, affirming 147 N. Y. App. Div. 436, 132 N. Y. Supp. 747. See *Carnegie Trust Co. v. Kress* (1915), 215 N. Y. 706, 109 N. E. 1068, where a complaint by the superintendent of banks in a civil action against a trust company director for neglect is upheld.

9. *Carrington v. Turner* (1905), 101 Md. 437, 61 Atl. 324; *Muth v. St. Louis Trust Co.* (1901), 88 Mo. App. 596.

cers, where it has received a benefit thereunder which it is unable to restore.<sup>10</sup>

That the vice-president of a trust company may be the "chief officer," so as to be authorized to sign papers in that capacity, appears in a Kentucky case.<sup>11</sup> The Court said:

"By Section 6 of the by-laws of the Fidelity Trust Company the vice-president is made one of the chief officers of the company, who, while second in name, is in fact equal in power and authority with the president of the company, and together with the chairman of the board, who is also one of the chief officers, these two conduct the trust affairs of the corporation, and Section 5 of the by-laws provides that the management of all trusts shall be divided among the three chief officers, the chairman of the board, the president, and vice-president, and that each of said officers shall be primarily responsible for the management of the trusts assigned to him. The record in this case shows that the settlement of the estate in question was in accordance with the express provisions of the by-laws assigned to the vice-president, and therefore he was the only officer of the company who was familiar with the affairs of the trust estate of which he was seeking a settlement, and was the only one qualified to make the affidavit in question, and was, in fact, the chief officer of the company, so far as the settlement of this estate was concerned."

In a case<sup>11½</sup> holding that the powers of the manager

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10. Callender v. Kelly (1899), 190 Pa. St. 455, 42 Atl. 957.

11. Mandel v. Fidelity Trust Co. (1908), Ky. 107 S. W. 775.

11½. Union Savings & Trust Co. v. Krumm (1915), 88 Wash. 20, 152 Pac. 681.

of a trust company branch are not limited to those of a cashier, it was said that: "The actual powers of titular officers are so varied even in the same institution, that courts have never laid down any rule as to what invariably constitutes the limits of apparent authority as confined by the inherent powers of a given office."

**§ 145. Imputable Knowledge of Officer.** In discussing the question of "the meaning of the word 'Trust' in Trust Company,"<sup>12</sup> a sharp distinction was noticed as existing between a trust company, in its fiduciary business, and that of an ordinary corporation, so far as acts of its officers are concerned, and there was cited a case,<sup>2</sup> which should here be referred to again. In this case it was held, that the rule of knowledge of an agent acting in a fraudulent transaction in his own behalf would not be imputed to his principal, or of an officer to his corporation, did not obtain as to the beneficiaries of a trust fund in favor of a trust company.

This case concerned the leaving on deposit of a trust fund in a bank of which the president of a trust company defendant was also president and knew its unsafe condition. The other directors were not shown to have such knowledge. Upon the bank becoming insolvent, the trust company was sued and claimed good faith in making the deposit, and the president of the bank acting in a hostile attitude to the trust company of which he also was a president and director, his knowledge should not be imputed to the trust company. The court held, however, that his very knowledge helped to fix, conclusively, liability on the trust company.

The court after observing that there was no contest

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12. Ante, Chapter V., Sec. 18.

2. *Germania Safe Vault & Trust Co. v. Driskill* (1902), 23 Ky. Lay Rep. 2050, 66 S. W. 610.



between the two corporations and, therefore, no place for the ruling to be invoked, then went on to say that a trust company, in its fiduciary capacity, acts not so much through its officers, as through its official boards, and "whatever knowledge they may have, wherever or whenever obtained will be used \* \* \* exactly as if they were acting personally as \* \* \* trustees." Therefore it was thought, that the trust company knew the unsafe condition of the bank, because one of its board of directors who placed the deposit therein allowed it to stay there, the trust company being held to contract that those managing its fiduciary affairs are "men of prudence, judgment, honesty and reasonable skill." Possibly an ordinary bank engages the same way, but this does not take away all affectation of the rule above alluded to. I make no criticism, however, of the ruling in this case, but regard it as well drawn as otherwise there would be a very serious difference between individual and corporate trustees, largely in favor of the former.

Where a trust company acts outside of its trust capacity, as in discounting a note offered to it, what one of its board of directors knows of its invalidity is not imputed to the trust company.<sup>3</sup> And, because of the varied powers exercised by a trust company, not in a trust capacity, it may be bound for the acts of its officers as to matters in which a bank would not be held bound.<sup>4</sup> This case shows, as the Court says, "the corporation to have been engaged, as modern trust companies often are, in promoting the creation and establishment of other corporations. The testimony strongly indicates that it

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3. *Jacobus v. Jamestown Mantel Co.* (1914), 211 N. Y. 154, 105 N. E. 210.

4. *Carington v. Turner* (1905), 101 Md. 437, 61 Atl. 324.



launched the Security Fire Insurance Company upon the community and assisted in floating its stock."

**§ 146. Distinction in Rule of Notice and Guarantee of Fidelity.** But the principle announced in the *Jacobus* case *supra* is also declared in a New Jersey case.<sup>5</sup> There it was sought to bind the trust company, as an ordinary money lending corporation, by knowledge of its president and cashier in the fraudulent purpose of an executor mortgaging trust property and its being used in a partnership venture by the three. The court said: "The president and cashier of the trust company, as members of the copartnership, were dealing with the institution of which they were the managing officers. In their own interest they were contracting with themselves, as representatives of the trust company, to advance money on a mortgage made by the trustee (executor) to the trust company which they intended to misapply, or aid in so doing, and their interest in the matter was so opposed to the interest of their principal, that knowledge of the wrong cannot equitably be imputed to their principal."

When this case is compared with the *Driskill* case *supra* an essential difference is seen to exist as to the binding force of acts by officers of a trust company so far as its ordinary business department is concerned and where its fiduciary relation is involved. Under the former aspect it would seem necessary to show that besides knowledge an officer would have to have an interest in a fraud for the presumption to arise that his principal was not informed. Under the latter aspect it would make no difference whether he had such interest or not,

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5. *Camden Safe Deposit & Trust Co.* (1904), 67 N. J. Eq. 489, 58 Atl. 607.

because in the trust relation the trust company guarantees the fidelity and honesty of its officers in handling its trust funds, and it guarantees the integrity and the preservation thereof.

**§ 147. Knowledge to be Imputable to Trust Company Must Presume Fraud.** A transaction on its face a lawful transaction must to be rendered invalid, because of knowledge by an officer of a trust company, in its ordinary business capacity, show corruption by the officer, so as to be imputable to his principal. Thus a case by Pennsylvania Supreme Court<sup>6</sup> shows a note given by an under officer of a trust company to it for the accommodation of its president. There was evidence to show that the president acknowledged to the trust company that this was his debt and it looked to him for payment. The Court said the defendant "did not become accommodation maker at the instance of the trust company and for its own purpose. If it had, he could now successfully defend. He gave the note for the accommodation of one of its customers, to whom it surrendered his note, when it received appellant's in its place, which was an absolute promise in writing that he would pay the indebtedness of his friend. That (his friend) continued to acknowledge his liability to the institution, and that it continued to look to him for payment, was only in probable relief of the appellant, and not in discharge of his absolute liability, voluntarily assumed. He lent his credit to his friend, and his friend's creditor accepted it. This is the whole case boiled down." While the case speaks of appellant's "friend," as a fact this friend was the president of the trust company, but

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6. Chestnut Street Trust & Savings Fund Co. v. Hart (1905), 217 Pa. 506, 66 Atl. 870.

this fact was ignored as unimportant in view of the note being an absolute promise to pay. It does not appear, either, that the bank's looking to the president for payment in any wise affected the transaction at the start or that for any consideration moving from the maker he was to be released.

The principle here treated is also illustrated in a later Pennsylvania case,<sup>7</sup> where knowledge of the president of a trust company of fraud or want of consideration in a note, is not imputable to the company, where the knowledge was acquired outside of his duties as such president. It was said that the authorities "hold clearly that a bank officer who offers to his bank a note for discount is to be regarded in that transaction as a stranger, and the bank is not chargeable with the officer's knowledge of fraud or want of consideration for the note."<sup>8</sup>

This rule, while apparently operating to further fraud, really is of no effect that way. One negotiating paper before maturity fair on its face, certainly can pass a good title to a *bona fide* purchaser for value, and the field of his market would be circumscribed by an accidental circumstance, if his individual knowledge as an officer is to be imputable to his corporation. But as we observed above, it is necessary where one is dealing with an officer of an ordinary corporation to deal with presumptions, while if the dealing with such a corporation is as a fiduciary, all that is necessary to hold it to liability is to show, that without proper authority or not acting

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7. *Dominion Trust Co. v. Hildner* (1914), Pa., 90 Atl. 69. But see *Tatum v. Commercial Bank & Trust Co.* (1915), Ala., 69 So. 508.

8. See *Merchants' Nat. Bank v. Lovitt* (1893), 114 Mo. 519, 21 S. W. 825, 35 Am. St. Rep. 770; *Taylor on Corp.*, 2nd Ed., 210; *Frenkel v. Hudson* (1886), 82 Ala. 158, 60 Am. Rep. 736; *Innerarity v. Merchants' Nat. Bank* (1885), 139 Mass. 332, 52 Am. Rep. 710.

in the way of an absolute insurer, the trust fund whose integrity it guaranteed has been lost.

**§ 148. Notice to Officer in his Department.** For notice to an officer to be imputable to a trust company it must be as to a matter in the line of his duty or relating to his department. This proposition is illustrated in a case in Second Circuit Court of Appeals.<sup>9</sup> This case showed the deposit of a cashier's check with a trust company to the credit of the depositor, and the giving by him of a check therefor to a railroad company on the same day. There was an attachment sued out against the railroad company. The trust company suspending payment this check was never presented. The Court said the duty of the trust company was to hold the deposit for the depositor, and this notwithstanding the fact that the depositor was an officer of the trust company, as "his connection with the trust company did not relate to the receiving deposits or crediting the same and the mere fact that he knew of a transaction which he was under no obligation to disclose and which did not relate to his department does not constitute notice to the Trust Company."<sup>10</sup>

**§ 149. Protection of Customers' Affairs from Disclosure by Trust Company Officers and Agents.** Confidential communications to a trustee, or to a banker, are not privileged. In support of this rule with respect to trustees, Wigmore in his treatise on evidence cites an English case,<sup>11</sup> wherein it appears that the Earl of Manchester held the key to a box containing deeds belonging to his *cestui que trust*. The Earl refused to sur-

9. *Sturdee v. Cuba Eastern R. Co.* (1912), 196 Fed. 211.

10. *Mayor v. Tenth National Bank* (1888), 111 N. Y. 446, 18 N. E. 618.

11. *Jones v. Countess of Manchester*, 1 Vtr. 197.

render the key on the ground that "it would be a breach of trust reposed in him, which he held sacred and inviolable." The Court said that the law required the surrender of the key, "for though it is against the duty of a counsellor or solicitor, etc., to discover the evidence which he who retains him acquaints him with, yet a trustee may and ought to produce writings, etc."

That communications to a banker are not privileged was the conclusion of the Kansas Supreme Court, after a review of prior authorities. In this case<sup>12</sup> it appears that upon an investigation by a grand jury as to whether a certain person had committed perjury in making a tax return, a banker was asked the amount of the suspect's deposits on the date with relation to which the tax return was made. To the objection that this was privileged, the Court said:

"It is next insisted that the petitioner should be discharged, because the matter concerning which he was interrogated was privileged, and that to require a disclosure by a banker of the amount standing to a depositor's credit on the bank books would be against public policy. Counsel thus contending frankly, admits that he has found no adjudicated case which sustains his position. The relation of debtor and creditor exists between a depositor and banker. By the inquiry in this case it was sought to ascertain how much the bank owed Bellingier on March 1st. The ordinary debtor would hardly stop to assert a privilege in his behalf to protect him from disclosing the amount owing by him to another. Again, it is argued that, to permit grand juries or courts to inquire into such private affairs of business men would cause withdrawal of deposits from banks annually for

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12. *In re Davies* (1904), 68 Kan. 791, 75 Pac. 1048.



many weeks preceding the 1st of March—some to escape taxation, others to avoid publicity. It is sufficient answer that annoyance to depositors, or the loss to banks predicted by counsel, has never appealed to courts or legislatures with enough force to work a change in the rules of evidence. In the case of *Loyd v. Freshfield*, 2 C. & P. 325, decided in 1826, it was held that a banker was bound to answer what a party's balance was on a given day, as it was not a privileged communication. The rule finds approval in the text-books. 2 *Taylor on Evidence*, Sec. 915; *Greenleaf on Evidence* (15th Ed.), Sec. 248. See also *MacKenzie v. Taylor*, 6 L. C. J. 83; *Hannum v. McRae*, 18 Ontario P. R. 185. That to compel a disclosure from the witness would be an unreasonable search for and seizure of the depositor's property is untenable. To obtain information from a witness, of the amount and location of another's money or property, cannot come within the constitutional inhibition against unreasonable searches and seizures. There was nothing confidential in a legal sense, between *Davies*, the banker, and his depositor, which would allow the former to assert that the business transactions between them were privileged."

The tendency is not to extend but to curtail the privilege doctrine, as it prevents the disclosure of the truth. To provide against the divulging of information relating to the affairs of trust company clients, except upon the witness stand, is another matter and worthy of serious consideration at the hands of those who desire to enhance the standing of the trust company as a repository of *complete* confidence. In line with this idea, the "Model Trust Company Law" prepared by counsel for the American Bankers' Association, a copy of which is set forth



in the Appendix of this book,<sup>13</sup> contains a section providing that officers and agents of trust companies shall keep secret and confidential, the affairs of all persons whose business is entrusted to their respective companies, except as they may be compelled by law to disclose them, under penalty of a fine of one hundred dollars for each offense. This is not a radically novel suggestion. It is a specific application to trust companies of the laws against divulging contents of telegraphic or telephonic messages,<sup>14</sup> disclosing or personally using lists of customers surreptitiously taken from an employer, etc.,<sup>15</sup> and laws providing that no stenographer shall disclose any matter received from an employer, except when "called as a witness and directed to testify by a proper court as to matters within his employment."<sup>16</sup>

The California trust company law contains a provision against disclosures by trust companies. No doubt this includes each and every officer, employe and agent of the company. The practical difference between this and the form suggested in the model law is the absence from the California act of any penalty for its violation. It reads as follows:

"Except as herein otherwise provided, any trust company exercising the powers and performing the duties provided for in this act, shall keep inviolate all communications confidentially made to it touching the existence, condition, management and administration of any trusts confided to it; and no creditor or stockholder of any such trust company shall be entitled to disclosure

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13. See page 277.

14. New York Penal Law, Sec. 552; California Penal Code, Sec. 619.

15. New York Penal Law, Sec. 553.

16. *Oh. Statutes*, 1908, p. 20.

of any such communication *provided, however*, that the president, manager and secretary of such trust company shall be entitled to knowledge of such communication; *and provided, further*, that in any suit, or proceeding touching the existence, condition, management or administration of such trust, the court wherein the same is pending may require disclosure of any such communication."<sup>17</sup>

**§ 150. Competency of Trust Company Officers, Employes and Stockholders to act as Notaries and Witnesses.** An acknowledgment taken before a notary who is a party in interest is void. Whether a person is a competent witness to a will depends upon whether he will take a benefit under it. How far are the officers, employes and stockholders identified with a trust company, so as to disable them from acting as notaries with respect to instruments running to the company, or as witnesses to wills appointing the company as executor or trustee? It has been held, in the absence of disabling legislation, that an officer who is not a stockholder may so act<sup>18</sup> and a Porto Rican case<sup>19</sup> holds that a deed of sale of real property executed in favor of a bank before a notary who is a stockholder is not void on that account. Indiana<sup>20</sup> has provided by statute that: "No person, being an officer in any corporation or association, or in any bank possessed of any banking powers, shall act as a notary public in the business of such bank, corporation

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17. Statutes and Amendments to the Codes, California, 1909, Chap. 76, Sec. 103.

18. Florida Savings Bank v. Rivers, 36 Fla. 575, 18 So. 850; Horbach v. Tyrell, 48 Neb. 514, 67 N. W. 485, 37 L. R. A. 434.

19. Suarez v. El Banco Territorial Y Agricola (1919), 16 Porto Rico 599.

20. Burns' Annotated Indiana Statutes, Sec. 9539.

or association.” Pennsylvania<sup>21</sup> provides: “That no director or officer in any bank, banking institution, or trust company shall do or perform any act or acts as notary public for such bank, banking institution, or trust company in which he or she may be a director or officer.” According to the Ohio Code:<sup>22</sup> “No banker, broker, cashier, director, teller, or clerk of a bank, banker, broker, or other person holding an official relation to a bank, banker, or broker, shall be competent to act as notary public in any matter in which such bank, banker, or broker is interested.”

The competency of a stockholder in a trust company to act as a witness to a will appointing the trust company executor was directly in issue in an Illinois case.<sup>23</sup> It appears that one of the subscribing witnesses to the will in question was a director and a stockholder of the trust company. It was held, that though the trust company was appointed it could not act as executor. In identifying the witness's interest with that of the company, the Court said: “Every dollar and every piece of property that comes to a corporation comes directly to the stockholders and increases the value of their stock. In substance, the stockholders, collectively, represented by the artificial corporate entity, were executors of the will.”

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21. Purdon's Digest, Supplement 1905-1910, p. 5807.

22. General Code of Ohio, 1910, Sec. 121.

23. *Scott v. Gouch* (1915), 111 N. E. 273.

## CHAPTER XX

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### Visitation and Supervision—Reports—Insolvency— Preferences

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§ 151. Visitation — Supervision — Reports. An implied duty of the State to see to the continuing solvency of trust companies has been mentioned.<sup>1</sup> The legal machinery through which this is accomplished is the placing of trust companies under the control of state banking departments, superintendents of banks, and the requirement of examinations and reports. The legislative power to provide for such supervision and the vesting of authority in commissioners to revoke a company's charter on non-fulfillment of the requirements cannot be doubted.<sup>2</sup> And though these requirements are termed "banking" regulation, trust companies which perform no banking functions are subject to them.<sup>3</sup> Their

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1. Chapter IV., Sec. 13.

2. *State v. Northwestern Trust Co.* (1904), 72 Neb. 497, 101 N. W. 14; *Carnegie Trust Co. v. Kress*, 215 N. Y. 706, 109 N. E. 1068; *Roseville Trust Co. v. Mott* (1915), 96 Atl. 402.

3. *In re McKinley-Lanning Loan & Trust Co.* (1892), 1 Pa. Dist. R. 551; *People v. Mutual Trust Co.* (1884), 96 N. Y. 10; *Sargent v. Oregon Savings & Loan Co.* (1914), Ore. 144 Pac. 455. That a trust company doing no trust business is not entitled to a return of bonds deposited with the state, because it might resume trust business at any time. See *Spalding v. Roberts* (1915), Calif. 149 Pac. 41.

primary object is to compel the operators of trust companies to observe the restrictions imposed by law upon them to the end that their solvency may be maintained. Their secondary object is to provide prompt and efficient means for taking charge when insolvency threatens or appears.<sup>5</sup> When possession is taken by state officials it is either for the purpose of maintaining the *status quo* until the threatening conditions are removed, or to collect the moneys due the company, including the double liability of stockholders<sup>4</sup> and to liquidate its affairs, but not for the purpose of administering the trusts that have been confided to the trust company. Thus it was stated by the Supreme Court of Wisconsin:<sup>5½</sup> "While the statute (section 2022, subsec. 2) contemplates that the corporation, whose property and business has been taken possession of by the Commissioner of Banking, may be permitted to resume business, it nowhere contemplates that the Commissioner of Banking shall carry it on or continue it longer than reasonably necessary to effect liquidation. Some of the trusts set out in the complaint will, by their terms, continue for many years and call for duties wholly foreign to that of the Commissioner of Banking.

Of course, upon taking possession the Commissioner of Banking holds all the property and business of the corporation, including trust property for a reasonable time until new trustees can be appointed to take charge of and execute the various trusts. And, while he so

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4. Van Tuyl v. Scharmann (1913), 208 N. Y. 53, 101 N. E. 779.

5. That such means are exclusive of individual right of creditors or stockholders, to institute a suit for a receiver and to wind up a trust company, appears in Craughwell v. Monsam River Trust Co. (1915), Me. 95 Atl. 222. This is to prevent needless alarm and the public injury which would result from unfounded individual action. See also Koch v. Missouri-Lincoln Trust Co. (1915), 181 S. W. 44.

5½. Sullivan v. Kuolt (1914), 156 Wis. 72, 145 N. W. 210.

holds the trust property, it is his duty to conserve and protect it as far as possible until new trustees can be appointed.

No formal action for the appointment of new trustees is necessary. The *cestuis que trustent* may by notice and motion apply to the court for the appointment thereof; or the Commissioner of Banking may himself, upon notice, move for their appointment. To do so would become his duty under the statute, if the *cestuis que trustent* unreasonably delayed to make application, for he is charged with the obligation of winding up the trust business of the insolvent corporation. In the present case the complaints may be considered petitions or motions addressed to the court for the purpose of securing the appointment of new trustees. Form is not the essence of the matter."

A superintendent of banking in taking possession of a trust company under the New York law has all the powers of a receiver. Though the trust company continues to exist as a legal entity, it cannot exercise its powers as a corporation.<sup>534</sup>

**§ 152. Identifying of Trust Fund or its Proceeds Necessary in Equity.** There is a great difference in holding, that a bank or trust company may be held as trustee, while it is still carrying on business as a solvent institution and giving to a trust fund a preference right in the distribution of the assets of an insolvent institution. There are abundant cases where a fund has been declared a trust fund, where there was no discussion of its being traced. For example, where taxpayers pay directly to a bank authorized to issue receipts therefor<sup>6</sup>

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534. *Lafayette Trust Co. v. Biggs* (1915), 213 N. Y. 280.

6. *Page County v. Rose* (1906), 130 Iowa 296, 106 N. W. 744, 5 L. R. A. (N. S.) 886, 8 Am. Cas. 114.



and it makes no difference that the bank, knowing the character of a deposit forbidding it to be treated otherwise than as a special deposit, mingles it with its general funds.<sup>2</sup>

But the principle, that there must be identification of a fund of a trust character, in its original or altered form, is shown by presumptions of law, as well as by plain deductions from fact. Thus it was said, in a case<sup>3</sup> where a tax collector deposited his collections in a bank that failed that: "The bank received it (the money) as a trust fund *volens volens*, and the principles of equity relating to trusts fully apply to it. It is a leading principle of equity jurisprudence that 'whenever a duty rests upon an individual, in the absence of all evidence to the contrary, it shall be presumed that he intended to do right rather than wrong.' \* \* \* It must, therefore, be presumed so far as it may, that the bank as trustee preserved the trust fund until all its other estate was exhausted, and that the trust moneys, so far as possible are represented in the remaining assets of the bank." If the facts permit the conclusion, that the cash assets of a failing bank are augmented by the trust fund, to that extent it will be recognized in the distribution as a preference claim.<sup>4</sup>

Where a bank within a few days of closing its door received a special deposit of \$1,500 and turned over in cash to the receiver \$1,152.66, the court said: "The

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2. *State v. Thum* (1898), 6 Idaho 323, 55 Pac. 858; *First Nat. Bank v. Bunting* (1900), 7 Idaho 27, 59 Pac. 929; *State v. Midland State Bank* (1897), 52 Neb. 1, 71 N. W. 1011, 66 Am. St. Rep. 484.

3. *Fogg v. Bank of Friar's Point* (1902), 80 Miss. 750, 32 So. 285.

4. *Independent District v. King* (1890), 80 Iowa 500, 45 N. W. 908; *State v. Bank of Commerce* (1898), 51 Neb. 725, 75 N. W. 28; *Beard v. Independent District* (1898), 88 Fed. 375, 31 C. C. A. 562; *Richardson v. New Orleans Debenture R. Co.* (1900), 102 Fed. 780, 42 C. C. A. 619, 52 L. R. A. 67.

legal presumption is that this belonged to the trust fund. The evidence proved that the fund had been encroached upon to some extent, but the law does not presume fraud or wrong-doing beyond what is established by the proof."<sup>5</sup>

**§ 153. Same Applied to a Trust Company.** The dual nature of a statutory trust company, that is to say as an ordinary business corporation in one aspect, and a trustee in another aspect, tends to enhance opportunity for confusing its relation to deposits made over its counters. As perceived above, so far as it remains a going concern it may obligate itself in almost any transaction as a trustee, just as any bank may, but whether outside of the preferences given by the law of its organization, this trustee capacity may accompany the transaction in insolvency is that of which I am to inquire.

A recent decision by New York Appellate Division<sup>6</sup> is quite instructive on the point of power in a trust company to make itself liable as a trustee in equity. The case shows that by manipulation, a third party by aid of its officers contrived to have money represented by a check payable to the company, passed to his individual account. It was said that: "The transaction, so far as the (trust company) was concerned in it, was negotiated and consummated by officers acting within the scope of their authority," but its "clear purpose was to provide a fund for the purchase of certain shares of stock, which fund or the shares were at all times to be held by the Carnegie Trust Co. for the benefit of others." "Under these circumstances a trust was created." The Court saw noth-

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5. *Woodhouse v. Crandall* (1902), 197 Ill. 104, 64 N. E. 292, 58 L. R. A. 385.

6. *Madison Trust Co. v. Carnegie Trust Co.* (1915), 167 N. Y. App. Div. 4, 152 N. Y. Supp. 517.

ing in "the fact that on receipt of the checks they were at once indorsed away, so that the proceeds went directly to Cummins."

In a still more recent New York case,<sup>7</sup> an account was kept with a depositor in what was called "the trust ledger." Upon the initiation of the account, the trust company in writing said "we accept the trust." The account, however, was drawn on as an ordinary account, but not by an ordinary check and from time to time it was replenished, as it became low, by additional deposits. The trust company for its services was to receive a large commission. The court said: "It might well be that in a contest between the plaintiff and the trust company, where the character of the account was an issue, the trust company would be estopped from denying that this was a trust account."

It was also held in a Connecticut case<sup>8</sup> that whether a trust was established and continued by a trust company as to a collection made by it depended upon how it treated the fund.

"The agent (trust company) would change the relation to that of debtor and creditor were it to mingle the funds collected with its own funds; credit the collections to the sending bank under its arrangement with it to make remittances at specified times. If, on the other hand, it held the funds collected, intending under its agreement to make immediate remittance, and for a very brief period for business convenience. Keeping the fund set apart or on special deposit for its principal, the trust would continue, and on failure of the agent pending

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7. *Le Baudy v. Carnegie Trust Co.*, 154 N. Y. Supp. 900, 908.

8. *Lippitt v. Thames Loan & Trust Co.* (1911), 88 Conn. 185, 90 Atl. 369.

transmission of the funds, the principal would be entitled to them." It is then declared that: "Whether or not the fund can be traced is as it seems to us, evidence of the existence or non-existence of this (trust) relation," and "whatever the ground of recovery adopted, the claimant to the fund must assume the burden of proving the existence of this trust relation."

As showing that such existence may be proved by the mere swelling of assets in the hands of a receiver, it was said that, if insolvency overtook the company and it nevertheless collected and held the proceeds they were impressed with a trust.

In Pennsylvania<sup>9</sup> it was said of a rule of court, that: Where a person occupying a fiduciary relation, such as a receiver, deposits money with a trust company, it must be kept separate and earmarked, the observance of such a rule would create a trust relation, but this would not apply where arrangement was made for the deposits to draw interest, and then declaration was made that though there were a trust in this case it would be a trust in equity, where the fund would have to be traced and the facts showed this could not be done.

This court allowed a bank to recover from the assignee of a trust company \$2,000 paid to it on its check as a mere accommodation the day before it closed its doors, where the package of money as it was turned over to the trust company still remained in its vaults unused. It was said that: "Under the facts, the package of money is impressed with a trust; the title never passed from plaintiff, because the possession was obtained by a plainly implied misrepresentation." This case it is per-

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9. *Commonwealth v. City Safe, D. & S. Co.* (1907), 218 Pa. 50, 66 Atl. 995.

ceived differs with that which precedes it, in the fact of ability to trace the money.

A New Hampshire case,<sup>10</sup> is such a useful one on the subject that I cannot forbear quoting from it at some length. It related to collections made by a trust company and the suit was against its assignee in insolvency. It was said: "If it were found that the relation was that of trustee and *cestui que trust*, or was of a fiduciary character, it would not follow that the claimants would be entitled to the relief they now seek. In *Cavin v. Gleason*, 105 N. Y. 256, 262, it is said: 'It is clear, we think, that upon an accounting in bankruptcy or insolvency, a trust creditor is not entitled to a preference over general creditors of the insolvent merely on the ground of the nature of his claim—that is that he is a trust creditor as distinguished from a general creditor \* \* \* The equitable doctrine that as between creditors equality is equity admits, so far as we know, of no exception founded on the greater supposed solvency of one debt, or that it arose out of a violation of duty, or that its loss involves greater apparent hardship in one case than another, unless it appears in addition that there is some specific recognized equity founded on some agreement or the relation of the debt to the assigned property which entitles the claimant, according to equitable principles, to preferential payment.' If there is property in the possession of the assignee that was held in trust by the defendants, the *cestuis que trustent* are entitled to their interest in it notwithstanding the assignment."

But: "Proving that there was a trust at one time in particular property does not prove that the trust is impressed upon other property at a later time, without

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10. *Bank Comm'rs. v. Security Trust Co.* (1901), 70 N. H. 536, 49 Atl. 113.

showing that the latter is the proceeds or substitute of the former. In this case, proof by the claimants that the defendants acting in a fiduciary capacity, collected money for them a year or six months, or a longer or a shorter time before the appointment of the assignee, does not prove that the money or property into which it may have been converted was on hand at the time the assignee took possession, nor that the estate as a whole, was then larger or more valuable than it would have been otherwise."

It would seem unnecessary to further pursue the branch of our subject under this section. The rule seems firmly established, that a trust will not be impressed upon other property according to the mere probabilities in a business disaster. Misusing trust funds may contribute to, rather than arrest, such result, but be that as it may, the rule requires a tracing of trust funds by the claimant thereof and this by proof of a rational, definite character. Thus a Massachusetts case,<sup>11</sup> is quoted as saying that: "If the trustee has become bankrupt, the court cannot say that the trust money is to be found somewhere in the general estate of the trustee that still remains." The New Hampshire case cites and discusses a great abundance of authority, both English and American, and says: "The difference in the authorities after all mainly relates to the application of the rule, rather than to the rule itself."<sup>12</sup>

**§ 154. Acts of Officers Creating Trust Fund Though No Money Passes to Trust Company.** Before leaving the subject of trust fund that may be followed in equity, it is interesting and perhaps important to con-

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11. *Little v. Chadwick* (1890), 151 Mass. 109, 110, 23 N. E. 1005, 7 L. R. A. 570.

12. See also *Empire State Surety Co. v. Carroll County* (1912), 194 Fed. 593, C. C. A.



sider the grounds of dissent of two of the five judges in *Madison Trust Co. v. Carnegie Trust Co. supra*. This minority agreed with the majority that there was no preferential lien under the New York statute. They contended, however, that no debt was shown against the trust company and, of course, no trust even of an equitable nature. The facts in this case are special, but they are argued in a way that suggests want of apparent power in a general officer acting alone to commit a trust company to responsibility.

The company was sued upon an agreement by the vice-president for the trust company, signing for it, to buy certain stocks and hold them as trustee. A check was given by plaintiff and it was indorsed by the company to another of its officers who appropriated its proceeds. The dissent by Scott, J. says: "The evidence is very clear that (the vice-president) was never in fact authorized to make the agreement in behalf of the Carnegie Trust Company. If the stocks had actually been bought, it would, I think, be well within the corporate power of the Carnegie Trust Company to hold them as trustee for the Van Norden Trust Company, and an agreement to do so, signed in the name of the company by any general officer, would doubtless be within the apparent scope of his authority. It is not that portion of the agreement, however, which the company is charged with breaching, for it never came into possession of the stock. The breach with which it is charged is that it did not buy the stocks at all and this part of the agreement was not, in my opinion, within the apparent scope of (the vice-president's) authority, \* \* \* and there is nothing in the case which would justify a presumption of authority in the vice-president to so agree, in face of the established want of actual authority."

Whether this reasoning would hold or not in the face of the fact, that turning over a check for the amount was the same as paying over the trust company's counter the amount thereof, it is unnecessary to inquire. It seems to me that this would obviate the difficulty of *ultra vires*. But the question suggested remains and a Court of Appeals case is cited in its support.<sup>13</sup>

This case, speaking of an agreement by a trust company to become the guarantor of a note secured by collateral in the way of certain bonds and stocks, said this was in effect an attempt to guaranty the future value of said stocks and bonds. The opinion, as distinguishing between a trust company and a bank, said: "Where a corporation is organized for business or trading purposes, and the only person interested therein, other than its business creditors, are its stockholders, and their only interest therein is to secure dividends upon their investment, the question of *ultra vires* is of comparatively small importance, except in behalf of the State in their public capacity, and the courts treat the question as it relates to such a corporation very differently than they do in the case of a banking corporation." It goes on to speak then of banking institutions occupying a fiduciary position and especially of trust companies saying: "Their primary work is of a trust capacity, and to a large extent they take the place of individual administrators, executors, guardians, committees, receivers and trustees." This contract was held to create no liability.

Where the vice-president of a trust company, trustee under a mortgage, made representations to prospective purchasers of the value of bonds secured thereby, it was

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13. *Gause v. Commonwealth Trust Co.* (1909), 196 N. Y. 434, 89 N. E. 476, 24 L. R. A. (N. S.) 967.

held there was no presumption of law that he had authority to make such representations.<sup>14</sup>

I think the dissenting opinion in the Carnegie Trust Company case is wrong, because the delivery to it of the check payable to its order was the same as paying to it the money it called for and a vice-president at least had power to indorse the check, unless the maker of the check knew or had reason to know he would indorse it in furtherance of an unlawful agreement.

**§ 155. Statutory Preferences Against Insolvent Trust Company.** In respect to the lamentable wreck of the Carnegie Trust Company and as a seeming reflection on administration of its assets in insolvency it was said by Mr. Justice Shearn in *Le Baudy v. Carnegie Trust Co. supra* that: "(Plaintiffs') case is a hard one, but it is no harder than that of thousands of other depositors of this wrecked institution. It is not to be wondered at that the plaintiff sought a preference, however, in view of the fact that preferential claims to the amount of several hundred thousand dollars have been allowed and paid out to a small group of creditors without any contest in court. In my opinion, all preferences in the cases of insolvent banking institutions should be resisted by the public authorities, except where they are statutory, and should, when in the courts, be disposed of wherever possible upon the principle that equality is equity."

If the learned judge takes this principle as explained in the New Hampshire case *supra*, this is all right, but, if he means that there should be substituted a measure like the Chancellor's boot to cover hard cases, then he greatly errs.

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14. *Davidge v. Guardian Trust Co.* (1911), 203 N. Y. 331, 96 N. E. 751.

The statutory preferences, which are found in the laws for the organization of trust companies, are fundamental in their very definition and should be enforced as religiously as are priorities in the distribution of decedents' estates. More sacred even than these priorities it may be argued are these preferences, because by the promises contained in the statute are funds entrusted to these institutions instead of to banks, and ordinary depositors and others dealing with trust companies enter into the relation of creditors with them as debtors upon a clear contractual understanding.

If the statute extends to too many things, which ought not to be differentiated in this regard, and depositors should deem they jeopardize their deposits in using these institutions as compared with ordinary banks, then they should resort to the latter instead of the former. If they think they help out the prospects of success they make their choice in opening accounts with them or having business relations with them outside of their fiduciary character as determined by statute.

For example, the Pennsylvania statute providing for the distribution of the estates of insolvent trust companies directs that deposits therein shall be first paid. It was held that a bank dealing with a trust company, say in collection of a draft, could not claim that a remittance made by the trust company's check, which was sent on in place of a depositor's check on it, was a mere substitute for such check, but the transaction was one of debtor and creditor between the bank and the trust company.<sup>15</sup>

And in a New Hampshire case,<sup>16</sup> under a statute

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15. *Commonwealth ex. rel. v. American Trust Co.* (1912), 241 Pa. 153, 88 Atl. 430.

16. *Bank Commissioners v. Security Trust Co.* (1908), 75 N. H. 107, 71 Atl. 377.

giving to depositors in the savings department of an insolvent trust company a preference, it was held that when the funds of such department were exhausted, they along with the holders of secured debentures, might share as to deficiency with unsecured creditors out of the general assets. It was said: "The legislature did not intend to make two separate institutions of such trust companies as were engaged in the savings bank business, but did intend to create funds for the special benefit of the depositors in their savings department."

## APPENDIX

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### Trust Company Statutes and Sources from Which Pamphlet Copies May be Obtained

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Statutes pertaining to trust companies are usually contained in pamphlets issued without charge by Departments of Banking or by Secretaries of State. In this form they generally embrace all amendments. It is, therefore, thought that a reference to these sources will prove of more practical benefit than a reprint which would necessarily soon be out of date. The full text of the New York Trust Company law, however, is printed at the end of this list, because of its recent revision and because of reference to some of its provisions in this book.

The report of the Committee on Protective Laws of the Trust Company Section of the American Bankers' Association to the Convention of 1915 (*Trust Companies Magazine* for Sept., 1915, p. 222), stated that the recently revised trust company law of Missouri "is worthy of being used as a model by other states." Copies of this law may be secured as indicated below.

*Alabama.* Trust Company laws are contained in pamphlet entitled "Domestic Corporation Laws of Alabama," issued by Secretary of State, Montgomery, Alabama.



*Arizona.* Correspond with Arizona Corporation Commission, Phoenix, Arizona.

*Arkansas.* Pamphlet copy of "Act for the Organization and Control of Banks, Trust Companies and Savings Banks." Address Bank Commissioner, Little Rock, Arkansas.

*California.* Pamphlet copy of Corporation Laws, Secretary of State, Sacramento, California. Banking and Trust Company laws, California Banking Association, Mills Bldg., San Francisco, California.

*Colorado.* "Banking Laws of Colorado," Secretary of State, Denver, Colorado.

*Connecticut.* Pamphlet: "Laws relating to Banks, Savings Banks and Trust Companies." Secretary of State, Hartford, Connecticut.

*Delaware.* Pamphlet of General Corporation Laws, Secretary of State, Dover, Delaware.

*District of Columbia.* Pamphlet entitled "Trust Company Laws of the District of Columbia." Ten cents per copy. Superintendent of Public Documents, Washington, D. C.

*Florida.* Pamphlet entitled "Banking and Trust Laws of the State of Florida." Comptroller, Tallahassee, Florida.

*Georgia.* Pamphlet copy of "An Act to Provide for the Incorporation of Trust Companies." Secretary of State, Atlanta, Georgia.

*Idaho.* Address Department of Banking, Boise, Idaho. No pamphlet copies of trust company laws were available at time of inquiry by author. Purchase of session laws of 1911 and 1913 containing original act and amendments was then necessary.

*Illinois.* Pamphlet: "Laws of the State of Illinois governing corporations with Bank Powers and Trust Companies." Auditor of Public Accounts, Springfield, Illinois.

*Indiana.* Book containing "Bank Laws," and law on "Loan, Trust and Safe Deposit Companies," Banking Department of the Auditor of State, Indianapolis, Indiana.

*Iowa.* Pamphlet copy of General Corporation laws and copy of Chapter 152 Acts of the 35th General Assembly, Session Laws of 1913. Secretary of State, Des Moines, Iowa.

*Kansas.* Pamphlet on Kansas Banking Laws, contains "The Trust Company Laws," State Bank Commissioner, Topeka, Kansas.

*Kentucky.* Trust Company Statutes are contained in pamphlet on "Kentucky Corporation Laws." Secretary of State, Frankfort, Kentucky.

*Louisiana.* Address State Banking Department, 300 New Orleans Court Building, New Orleans, Louisiana. No pamphlet copies of trust company or banking laws were available at date of inquiry by the author in Sept., 1915. Statutes pertaining to trust companies run through various acts of the Legislature and are contained in "Marrs Corporation Laws of Louisiana," published by F. F. Hansel & Bro. Ltd., New Orleans.

*Maine.* Pamphlet on "Banking Laws" contains trust company statutes. Banking Department, Augusta, Maine.

*Maryland.* Not available in pamphlet form upon date of inquiry by the author. See Annotated Code of Maryland; Laws of 1910, Chap. 219 and subsequent Session Laws.

*Massachusetts.* Pamphlet on "Statutes Relating to Trust Companies," Bank Commissioner, Boston, Mass.

*Michigan.* Pamphlet on "Laws Relating to Banking," contains statutes on "Trust, Deposit and Security Companies." Secretary of State, Lansing, Michigan.

*Minnesota.* Not available in pamphlet form on date of inquiry by the author directed to Department of Banking, St. Paul, Minn. See Revised Laws of Minn. (1905), Chap. 58 and Session Laws of 1911 for trust company statutes.

*Mississippi.* Pamphlet entitled "Mississippi Banking Law," Banking Department, Jackson, Mississippi.

*Missouri.* Trust Company statutes are contained in booklet: "Banking Laws." Bank Commissioner, Jefferson City, Missouri.

*Montana.* Pamphlet on Corporation Laws contains statutes pertaining to "Trust Deposit and Security, and Security Companies." Secretary of State, Helena, Montana.

*Nebraska.* Pamphlet on Corporation Laws contains statutes pertaining to "Trust Companies." Secretary of State. For information generally as to trust companies address Banking Department, Lincoln, Neb.

*Nevada.* Trust powers of banks are contained in Sec. 15 of General Corporation Law, pamphlet copy of which may be secured from Secretary of State, Carson City, Nevada.

*New Hampshire.* Pamphlet of Laws relative to "State Banks, Savings Banks, Trust Companies and Building and Loan Associations." Board of Bank Commissioners, Concord, New Hampshire.

*New Jersey.* Pamphlet, "Laws of New Jersey relating to Banks and Banking, Trust Companies and Safe

Deposit Corporations." Department of Banking and Insurance, Trenton, New Jersey.

*New Mexico.* Pamphlet: "New Mexico Laws relating to Banks of Discount and Deposit, Savings Banks, Trust Companies and Building and Loan Associations." State Corporation Commission, Santa Fe, New Mexico.

*New York.* Pamphlet copy of Banking Laws containing provisions pertaining to Trust Companies. Superintendent of Banking Department, Albany, New York.

*North Carolina.* Trust company provisions are contained in pamphlet of "Banking Laws." Corporation Commission, Raleigh, North Carolina.

*North Dakota.* Statutes on "Organization and Management of Annuity Safe Deposit Surety and Trust Companies" are contained in pamphlet entitled, "Laws Regulating Corporations, except Insurance, Banking and Railroads." Secretary of State, Bismarck, North Dakota.

*Ohio.* Trust company laws were not available in pamphlet form on date of inquiry by the author. See General Code of Ohio and subsequent session laws.

*Oklahoma.* Leaflet containing general corporation law under which trust companies are organized and provision for double liability of stockholders in trust companies. State Banking Department, Oklahoma City, Oklahoma.

*Oregon.* Pamphlet copy of "Laws Relating to Banking." State Superintendent of Banks, Salem, Oregon.

*Philippine Islands.* Provisions pertaining to "Trust Corporations" are contained in pamphlet of corporation

act enacted by the Philippine Commission. Superintendent of Public Documents, Washington, D. C.

*Pennsylvania.* Pamphlet copy of "Digest and Supplement of Laws Relating to Banks, Trust Companies," etc. Commissioner of Banking, Harrisburg, Pennsylvania.

*Rhode Island.* Pamphlet entitled "Banking Laws of Rhode Island." Bank Commissioner's Office, Providence, Rhode Island.

*South Carolina.* Pamphlet entitled "Banking Laws of the State of South Carolina." (For trust company powers, see page 69.) State Bank Examiner, Pickens, South Carolina.

*South Dakota.* Pamphlet copy of "Laws Relating to Banking." Secretary of State, Pierre, South Dakota.

*Tennessee.* Pamphlet copy of Banking Law. Secretary of Tennessee Bankers' Association, 1015-16. Independent Life Building, Nashville, Tennessee.

*Texas.* Pamphlet: "State Banking Laws of Texas." Commissioner of Insurance and Banking, Austin, Texas.

*Utah.* "Loan, Trust and Guaranty Association" in pamphlet of "Corporation Laws." Secretary of State, Salt Lake City, Utah.

*Vermont.* Pamphlet of General Corporation Laws. Secretary of State, Montpelier, Vermont.

*Virginia.* Pamphlets containing "Corporation Laws" and "Banking Laws." (Page 20.) Banking Division, State Corporation Commission, Richmond, Virginia.

*Washington.* Trust Company statutes are contained in pamphlet on "Corporation Laws." Secretary of State, Olympia, Washington.

*West Virginia.* Pamphlet: "Banking Laws." Commissioner of Banking, Charleston, West Virginia.

*Wisconsin.* Pamphlet: "Banking Laws." State Banking Department, Madison, Wisconsin.

*Wyoming.* "Trust Company and Trust and Savings Banks." Laws are contained in pamphlet of corporation laws. Secretary of State. See also pamphlet on "Banking Laws." State Bank Examiner, Cheyenne, Wyoming.



DRAFT OF "MODEL TRUST COMPANY  
LAW," PREPARED BY MR. THOMAS  
B. PATON, GENERAL COUNSEL,  
AMERICAN BANKERS' AS-  
SOCIATION (1913)

§ 1. Capital. The capital stock of any trust company organized under this act in a place having a population of six thousand inhabitants or less, shall not be less than fifty thousand dollars; in a city of more than six thousand and not more than fifty thousand inhabitants, shall not be less than one hundred thousand dollars; in a city of more than fifty thousand and not more than two hundred thousand inhabitants, shall not be less than two hundred thousand dollars; in a city of more than two hundred thousand and not more than three hundred thousand inhabitants, shall not be less than three hundred thousand dollars; in a city of more than three hundred thousand and not more than four hundred thousand inhabitants, shall not be less than four hundred thousand dollars; and in a city of more than four hundred thousand inhabitants shall not be less than five hundred thousand dollars. No corporation organized under this act shall create more than one class of stock. The entire capital shall be paid in cash before any trust company shall be authorized to transact any other business than such as relates to its formation and organization, and such payment shall be

certified to the bank commissioner under oath by the president, and the treasurer or secretary of the trust company.

**§ 2. Reserve.** Every trust company shall at all times maintain a reserve fund of at least fifteen per centum of its aggregate deposits. Of such fifteen per centum, not less than four-fifteenths shall at all times be kept on hand in lawful money of the United States. The remainder may consist of balances subject to demand draft which the trust company may have with any National bank, State bank or trust company in a city designated in the National banking laws as a reserve city or a central reserve city. Whenever the reserve fund of any trust company shall be below the required fifteen per centum, such trust company shall not increase its liabilities by making any new loans nor make any dividend of its profits until the required reserve has been restored. The bank commissioner shall notify any trust company whose reserve fund shall fall below said fifteen per centum and if such trust company shall fail for thirty days thereafter to make good such reserve fund, the bank commissioner may take the lawful steps to wind up its business.

**§ 3. Supervision.** Every trust company organized or doing business in this State shall make to the bank commissioner not less than five reports during each year, verified by the oath of its treasurer, which report shall exhibit in detail and under appropriate heads, according to form which may be prescribed by the commissioner, the resources and liabilities of the trust company at the close of business on any past day specified by the commissioner. Such report shall be transmitted to the commissioner within ten days after

the receipt of a request therefor from him and shall be published in such form as he may prescribe in a newspaper in the county where the trust company is located. Every trust company which fails to make and transmit any such report when requested by the commissioner shall forfeit to the State ten dollars for each day that it delays to transmit such report. The bank commissioner shall visit and examine every trust company semi-annually or oftener and may examine its books and papers in the presence of one or more of its officers, to ascertain whether it has been managed according to law; may examine any persons under oath in relation to its affairs, which oath said commissioner may administer; may compel the attendance of witnesses and production of books and papers by suitable process; and in case any person shall refuse to furnish any information requested by the commissioner under authority of any provision of this section, he may apply to a judge of the —— court who shall cause such person to come before him and inquire into the facts set forth in such application and may thereupon commit such person to jail until he shall comply with such request; but the bank commissioner shall not impart any information obtained by him in the course of such examination, except in so far as may become necessary in the performance of his duties.

(Note: In the majority of States, the laws now provide a bank department, with a bank commissioner or superintendent empowered to supervise and examine trust companies and receive reports from them. A provision such as above, which is taken from the law of Connecticut, would of course not be necessary in such States. In States where no such provisions exist, the proposed statute would probably have to go further and

provide for the creation of a bank department, with powers and duties of commissioner, the making of reports and examinations and also procedure where conditions were found to be unsatisfactory.)

**§ 4. Qualification of Directors.** Every director must, during his whole term of service, be a citizen of the United States and at least three-fourths of the directors must be residents of the State in which the trust company is located during their continuance in office. Every director must own, in his own right and unpledged, at least ten shares of the capital stock of the trust company of which he is a director. The place of any director who ceases to be the owner of the required number of shares of stock, or who becomes in any other manner disqualified shall *ipso facto* become vacant.

**§ 5. Examination by Directors.** It shall be the duty of the board of directors of every trust company at least once in each year to examine, or to cause a committee of at least three of its members to examine, fully into the books, papers, accounts, investments and general affairs of the trust company of which they are directors, with the special purpose of verifying the assets and investments with the book requirements thereof, determining the market value and yield of the securities held, the correctness of accounts and generally as to the condition of the trust company with reference to its assets and liabilities and the various trusts which it is executing; and into such other matters as the bank commissioner may require. Such directors shall have power to employ such assistance in the making of such examination as they may deem necessary. Within ten days after the completion of each of such examinations a report in writing, in such form as may be prescribed

by the bank commissioner, sworn to by the directors making the same, shall be made to the trust company and be filed with its records and a duplicate filed in the office of the bank commissioner. If the directors of any trust company shall fail to make, or cause to be made, and file such report of examination in the manner and within the time specified, such trust company shall forfeit to the people of the State one hundred dollars for each day such report shall be delayed, which penalty may be recovered through an action brought by the attorney-general against such trust company in the name of the people of the State. The moneys forfeited by this Section, when recovered, shall be paid into the State treasury to be used to defray the expenses of the office of bank commissioner.

**§ 6. Deposits.** Every trust company may receive deposits subject to check or to be repaid in such manner and on such terms and with or without interest as may be agreed upon by the depositor and the trust company; provided that no trust company shall incur a total deposit liability in excess of ten times its capital, surplus, and undivided profits.

**§ 7. Restrictions on Loans.** *a.* The total liabilities to any trust company of any person, corporation, or firm, for money borrowed, including in the liabilities of a firm the liabilities of the several members thereof, shall at no time exceed ten per cent of the amount of the capital stock of such trust company actually paid in and its surplus and undivided profits combined. The provisions of this section shall not apply to loans secured by collateral, so long as the market value of such collateral shall exceed by twenty per cent the total liabilities secured in each case by such collateral, but no

loan on collateral shall at any time exceed twenty per cent of the amount of the capital stock of such trust company actually paid in and its surplus and undivided profits combined, and the total loans to any one person, corporation, or firm, including in the liabilities of the firm the liabilities of the several members thereof, shall at no time exceed twenty per cent of the capital, surplus, and undivided profits combined of such trust company.

*b.* No trust company shall make any loan or discount upon the pledge of its own stock.

*c.* No trust company shall make any loan upon or discount any paper made, accepted, indorsed or guaranteed by any of its executive officers or clerks, or by any partnership of which any such officer or clerk is a member.

*d.* No trust company shall permit any single director to become obligated to it to an amount exceeding five per centum of its combined capital, surplus and undivided profits nor permit the combined obligations to it of all its directors at any one time to exceed twenty per centum of such capital, surplus and undivided profits: Provided that these requirements shall not apply to loans secured by collateral, so long as the market value of such collateral shall exceed by twenty per centum the total liabilities in each case secured by such collateral; but such loans on collateral to any one director shall at no time exceed ten per centum of the combined capital, surplus and undivided profits of such trust company.

*e.* Every trust company which shall violate any of the foregoing provisions of this section shall forfeit to the State not less than five hundred dollars nor more than three thousand dollars for each offense. Every



official of a trust company responsible for the violation of any provision of this section shall be liable to such trust company in a civil suit for any damages resulting therefrom and shall be fined not more than one hundred dollars or imprisoned not more than one year or both.

**§ 8. Unlawful Use of Words "Trust" or "Trust Company."** No person, association, firm or corporation, other than a corporation authorized by the laws of this State to do the business of a trust company and subject to the supervision of the bank commissioner as provided by such laws, shall make use of the word or words "Trust" or "Trust Company" as part of any artificial or corporate name or title, nor make use of any sign at the place where his or its business is transacted having thereon such words or any other word or words indicating that such place or office is the place or office of a trust company, nor make use of or circulate any written or printed, or partly written or partly printed matter whatever having thereon any such words or any other word or words indicating that the business conducted is that of a trust company, nor transact business in the way or manner of a trust company or in such way or manner as to lead the public to believe, or as in the opinion of the bank commissioner might lead the public to believe, that his or its business is that of a trust company. Every person or persons violating the provisions of this section either as an individual or an interested party in any association, firm or corporation shall be punished by fine of not less than one hundred dollars nor more than one thousand dollars. The bank commissioner shall have authority to examine the accounts, books and papers of any person, association, firm or corporation whom he has reason to suspect is violating the

provisions of this section and to summon and examine under oath, which he is empowered to administer, any person whom he may have reason to believe has violated or is a participant in any violation of the provisions of this section.

**§ 9. Trust Funds Not to be Mingled, Etc.** Besides its general books of account, every trust company shall keep separate books for all trust accounts. All funds and property held by it in a trust capacity shall at all times be kept separate from the funds and property of the corporation, and all deposits by it of such funds in any banking institution shall be deposited as trust funds, to its credit and as trustee and not otherwise. Every security in which trust funds or property are invested shall at once, upon the receipt thereof, be indorsed and transferred to it as trustee, executor, administrator, guardian, receiver, assignee, or other trustee, as the case may be, and not in blank or otherwise, and immediately entered in the proper books as belonging to the particular trust whose funds have been invested therein. Any change in such investment shall be fully specified in and under the account of the particular trust to which it belongs, so that all trust funds and property can be readily identified at any time by any person. No investments or loans of trust funds shall be made without being first authorized by the board of directors, except that where, in pursuance of any general authority, the same are made in the interim of board meetings, they must be reported at the next meeting of the board.

**§ 10. Semi-Annual Statements.** It shall be the duty of every trust company, beginning at a period six months from the creation of the particular trust, to

make to the *cestui que* trust or beneficiary a semi-annual statement in writing showing in detail the receipts and disbursements and the general condition of such trust. Except as to minors and persons under disability, the failure by any *cestui que* trust or beneficiary to disapprove or object to such written statement, or any part thereof, within sixty days after receipt of the same shall be deemed and taken as an agreement to the correctness of the account rendered.

**§ 11. Unlawful Sales by Trust Company.** Except in case of loans secured by mortgage of real estate, it shall be unlawful for any trust company acting in behalf of any *cestui que* trust or beneficiary or in behalf of any estate which it holds as trustee or in any other fiduciary capacity, to purchase any securities or assets owned by such trust company in its own right.

**§ 12. Investment of Trust Funds.** Trust funds, unless it is otherwise provided in the instrument creating the trust, may be loaned on the security of mortgages on unincumbered real estate in this State, double in value the amount loaned, or may be invested in such mortgages or in bonds or loans of the United States or of this State or of any town, city, village, school district or other political subdivision thereof, or in any bonds, stocks or other securities which the savings banks in this State are, or may be authorized by law to invest in, or may be deposited in trust companies or savings banks incorporated in this State. In the making of investments, trust companies shall only be liable to the *cestui que* trust or beneficiary for the exercise of reasonable care and diligence.

**§ 13. Confidential Information.** It shall be the duty of every trust company and of every director, offi-

cer and agent thereof, to keep secret, confidential and inviolate, the affairs of all persons whose business is entrusted to it either in a banking or trust capacity and to make no disclosure thereof, save only such as may be compelled by law. Any director, officer or agent violating this provision shall be fined one hundred dollars for each offense.

## TRUST COMPANY LAW OF NEW YORK

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The trust company law of New York as revised on April 16, 1914, is contained in Chapter 369 of the Laws of 1914 as Article V of the "Banking Law."

In Article I, Sec. 2 of this chapter "trust company" is defined as follows:

"The term, 'trust company,' when used in this chapter, means any domestic corporation formed for the purpose of taking, accepting and executing such trusts as may be lawfully committed to it, acting as trustee in the cases prescribed by law, receiving deposits of money and other personal property, and issuing its obligations therefor, and lending money on real or personal securities."

### ARTICLE V

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#### Trust Companies

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Section 180. Incorporation; organization certificate.

Section 181. Notice of intention to organize.

Section 182. Submitting organization certificate for examination.

Section 183. When corporate existence begins; conditions precedent to commencing business.

- Section 184. Deposit of securities with superintendent.
- Section 185. General powers.
- Section 186. Additional powers of certain trust companies.
- Section 187. Powers of specially chartered trust companies.
- Section 188. Appointment in fiduciary capacities; exercise of fiduciary powers.
- Section 189. Restrictions on taking and holding real estate.
- Section 190. Restrictions on liabilities of one person and on loans and purchases of securities.
- Section 191. Restrictions on power to contract or to accept or execute trusts.
- Section 192. Restrictions on power to receive deposits of funds paid into court.
- Section 193. Restrictions on investments of capital.
- Section 194. Restrictions as to entries in books.
- Section 195. Restrictions on branch offices.
- Section 196. Restrictions on deposit of trust company's funds.
- Section 197. Reserves against deposits.
- Section 198. Deposits of minors and trust deposits and deposits in the names of more than one person.
- Section 199. Interpleader in certain actions; costs.
- Section 200. Rate of interest.
- Section 201. Interest on collateral demand loans of not less than five thousand dollars.
- Section 202. Calculation of earnings for divided period.
- Section 203. Surplus fund.
- Section 204. Dividends.
- Section 205. Change of location.



- Section 206. Rights and liabilities of stockholders.
- Section 207. Assessment of stockholders when capital impaired.
- Section 208. Number of directors; classification; tenure.
- Section 209. Annual meeting of stockholders.
- Section 210. Qualifications of directors.
- Section 211. Oath of directors.
- Section 212. Failure to elect; vacancies.
- Section 213. Annual meeting of directors.
- Section 214. Monthly meetings of directors.
- Section 215. Examinations by directors.
- Section 216. Reports of directors' examinations.
- Section 217. Communications from banking department.
- Section 218. Reports to superintendent.
- Section 219. Annual report of unclaimed deposits, dividends and interest.
- Section 220. Trust company to pay expenses incurred in its behalf by superintendent.
- Section 221. Preservation of books and records.
- Section 222. Restrictions on officers, directors and employes.
- Section 223. Prohibition against encroachments on powers.

**§ 180. Incorporation; Organization Certificate; Amount of Capital Stock.** When authorized by the superintendent of banks as provided by section twenty-three of this chapter, seven or more persons may form a corporation to be known as a trust company. Such persons shall subscribe and acknowledge an organization certificate in duplicate, which shall specifically state:

1. The name by which the trust company is to be known.

2. The place where its business is to be transacted.
3. The amount of its capital stock, and the number of shares into which such capital stock shall be divided, which capital stock shall amount to not less than:

- (a) One hundred thousand dollars, if the place where its business is to be transacted is an incorporated or unincorporated village or city the population of which does not exceed twenty-five thousand.

- (b) One hundred and fifty thousand dollars, if the place where its business is to be transacted is a city the population of which exceeds twenty-five thousand but does not exceed one hundred thousand.

- (c) Two hundred thousand dollars, if the place where its business is to be transacted is a city the population of which exceeds one hundred thousand but does not exceed two hundred and fifty thousand.

- (d) Five hundred thousand dollars, if the place where its business is to be transacted is a city the population of which exceeds two hundred and fifty thousand.

4. The names and places of residence of the incorporators.

5. The term of its existence, which may be perpetual.

6. A declaration that each incorporator will accept the responsibilities and faithfully discharge the duties of a director therein if elected to act as such when authorized by the provisions of this chapter.

Such certificate may provide for the manner in which the stock of the corporation may be transferred and for the number of directors necessary to constitute a quorum.

**§ 181. Notice of Intention to Organize; Filing,**

**Publication and Service Upon Existing Banks and Trust Companies.** At the time of executing such organization certificate, the proposed incorporators shall sign a notice of intention to organize such trust company which shall specify their names, the name of the proposed corporation, the amount of its capital stock, and its location as set forth in the organization certificate. The original of such notice shall be filed in the office of the superintendent of banks within sixty days after the date of execution, and a copy thereof shall be published at least once a week for four successive weeks in a newspaper designated by the superintendent as provided in section twenty of this chapter, such publication to be commenced within thirty days after such designation. A copy of such notice shall, at least fifteen days before the organization certificate is filed with the superintendent for examination, be served upon each state bank and trust company organized and doing business in the village, borough or city, if in a city not divided into boroughs, specified as the location of the proposed trust company by mailing such copy, postage prepaid, to said banks and trust companies.

**§ 182. Submitting Organization Certificate to Superintendent; Proof of Publication and Service of Notice of Intention.** After the lapse of at least twenty-eight days from the date of the first due publication of the notice of intention to organize and within ten days after the date of the last publication thereof, the organization certificate, executed in duplicate, shall be submitted to the superintendent of banks at his office together with affidavits or other evidence satisfactory to him showing due publication and service of the notice of intention to organize prescribed in section one hundred eighty-one of this article.

**§ 183. When Corporate Existence Begins; Conditions Precedent to Commencing Business.** When the superintendent shall have endorsed his approval on the organization certificate, as provided by section twenty-three of this chapter, the corporate existence of the trust company shall begin, and it shall then have power to elect officers and transact such other business as relates to its organization. But the trust company shall transact no other business until:

1. All of its capital stock shall have been fully paid in cash and an affidavit stating that it has been so paid, subscribed and sworn to by its two principal officers shall have been filed in the clerk's office of the county in which its principal office is located and a certified copy thereof in the office of the superintendent;

2. It shall have filed in the office of the superintendent a list of its stockholders, verified by two of its principal officers, giving the name, residence, post-office address and number of shares of stock held by each stockholder;

3. It shall have made the deposit with the superintendent required by section one hundred eighty-four of this article;

4. The superintendent shall have duly issued to it the authorization certificate specified in section twenty-four of this chapter.

**§ 184. Deposit of Securities with Superintendent.** Every trust company shall, until an order of the Supreme Court is obtained declaring the business of the trust company closed, keep on deposit with the superintendent of banks interest bearing stocks or bonds of the United States or of this state, or of any city, county, town, village or free school district in this state,

authorized by the legislature to be issued, to the amount in value of ten per centum of its capital stock, but not less in any case than:

1. One hundred thousand dollars, if its principal place of business is located in a city the population of which exceeds five hundred thousand;

2. Fifty thousand dollars, if its principal place of business is located in a city the population of which exceeds one hundred thousand but does not exceed five hundred thousand;

3. Thirty thousand dollars, if its principal place of business is located in a city the population of which exceeds twenty-five thousand and does not exceed one hundred thousand;

4. Twenty thousand dollars, if its principal place of business is located elsewhere in this state.

Such securities shall be registered in the name of the superintendent of banks of the state of New York in trust for the creditors of and depositors with such trust company and subject to sale and transfer, and to the disposal of the proceeds thereof by the superintendent only on the order of a court of competent jurisdiction. The trust company, so long as it shall continue solvent and comply with the laws of the state, may be permitted by the superintendent to collect the interest on the securities so deposited and from time to time to exchange such securities for others, as provided by section thirty-five of this chapter, and may examine and compare such securities as provided by section thirty-six of this chapter.

**§ 185. General Powers.** In addition to the powers conferred by the general and stock corporation laws, every trust company shall, subject to the restric-

tions and limitations contained in this article, have the following powers:

1. To act as the fiscal or transfer agent of the United States, of any state, municipality, body politic or corporation; and in such capacity to receive and disburse money, to transfer, register and countersign certificates of stock, bonds or other evidences of indebtedness, and to act as attorney in fact or agent of any person or corporation, foreign or domestic, for any lawful purpose.

2. To discount and negotiate promissory notes, drafts, bills of exchange and other evidences of debt; buy and sell exchange, coin and bullion; lend money on real or personal securities; and to receive deposits of moneys, securities or other personal property from any person or corporation upon such terms as the company shall prescribe.

3. To lease, hold, purchase and convey any and all real property necessary in the transaction of its business, or which the purposes of the corporation may require, or which it shall anywhere acquire in settlement or partial settlement of debts due the corporation by any of its debtors, or to secure such debts, or through sales under any judgment, decree or mortgage held by it.

4. To act as trustee under any mortgage or bonds issued by any municipality, body politic or corporation, foreign or domestic, and accept and execute any other municipal or corporate trust not prohibited by the laws of this state.

5. To accept trusts from and execute trusts for married women, in respect to their separate property, and to be their agent in the management of such property or to transact any business in relation thereto.



6. To act under the order or appointment of any court of competent jurisdiction as guardian, receiver or trustee of the estate of any minor, and as depositary of any moneys paid into court, whether for the benefit of any such minor or other person, corporation or party, and in any other fiduciary capacity.

To be appointed and to act under the order or appointment of any court of competent jurisdiction as trustee, guardian, receiver or committee of the estate of a lunatic, idiot, person of unsound mind or habitual drunkard, or as receiver or committee of the property or estate of any person in insolvency or bankruptcy proceedings; to be appointed and to accept the appointment of executor of or trustee under the last will and testament, or administrator with or without the will annexed of the estate of any deceased person.

7. To take, accept and execute any and all such legal trusts, duties and powers in regard to the holding, management and disposition of any estate, real or personal, wherever located, and the rents and profits thereof, or the sale thereof, as may be granted or confided to it by any court of competent jurisdiction, or by any person, corporation, municipality or other authority and it shall be accountable to all parties in interest for the faithful discharge of every such trust, duty or power which it may so accept.

8. To take, accept and execute any and all such trusts and powers of whatever nature or description as may be conferred upon or entrusted or committed to it by any person or persons, or any body politic, corporation, domestic or foreign, or other authority by grant, assignment, transfer, devise, bequest or otherwise, or which may be entrusted or committed or transferred to

it or vested in it by order of any court of competent jurisdiction, or any surrogate, and to receive, take, manage, hold and dispose of according to the terms of such trust or power any property or estate, real or personal, which may be the subject of any such trust or power.

9. To purchase, invest in and sell stocks, bills of exchange, bonds and mortgages and other securities; and when moneys or securities for moneys are borrowed or received on deposit, or for investment, the bonds or obligations of the company may be given therefor, but it shall have no right to issue bills to circulate as money.

10. To accept for payment at a future date, drafts drawn upon it by its customers and to issue letters of credit authorizing the holders thereof to draw drafts upon it or its correspondents at sight or on time, not exceeding one year.

11. To receive, upon terms and conditions to be prescribed by the company, upon deposit for safe keeping, bonds, mortgages, jewelry, plate, stocks, securities and valuable papers of any kind, and other personal property, for hire, and to let out receptacles for safe deposit of personal property.

12. To purchase and hold, for the purpose of becoming a member of a federal reserve bank, so much of the capital stock thereof as will qualify it for membership in such reserve bank, pursuant to an act of Congress, approved December twenty-three, nineteen hundred and thirteen, entitled the "Federal Reserve Act"; to become a member of such federal reserve bank, and to have and exercise all powers, not in conflict with the laws of this state, which are conferred upon any such member by the Federal Reserve Act. Such trust company and its directors, officers and stockholders shall

continue to be subject, however, to all liabilities and duties imposed upon them by any law of this state and to all the provisions of this chapter relating to trust companies.

**§ 186. Additional Powers of Certain Trust Companies.** Every trust company which at the time this act takes effect lawfully possesses and exercises the power, for hire, to examine titles to real estate, to procure and furnish information in relation thereto, and to guarantee or insure the title to real estate to persons interested, in such real estate or in mortgages thereon, against loss, by reason of defective title or other encumbrances of or upon, such real estate, shall continue to possess such power, but no other trust company shall hereafter have or exercise such power.

**§ 187. Powers of Specially Chartered Trust Companies.** Every trust company incorporated by a special law shall possess the powers of trust companies incorporated under this chapter and shall be subject to such provisions of this chapter as are not inconsistent with the special laws relating to such specially chartered company.

**§ 188. Provisions Relating to Appointment of and Exercise of Powers as Executor and in Other Fiduciary Capacities.** 1. **Executor.** When any trust company is appointed executor in any last will and testament, the court or officer authorized to grant letters testamentary in this state, shall, upon the proper application, grant letters testamentary thereon to such corporation or to its successor by merger.

2. **Guardian, trustee or administrator.** Any trust company may be appointed guardian, trustee or administrator, with or without the will annexed, on the applica-

tion or consent of any person acting as such or entitled to such appointment and in the place and stead of such person, or such trust company may be joined with any person so acting or entitled to such appointment; but such appointments shall be made upon such notice, as is required by law, to the persons interested in the estate or fund and on the consent of such of the principal legatees or other persons interested in the estate or fund as the court, surrogate or judge making the appointment shall deem proper. No appointment so made shall be deemed to increase the number of persons entitled to full compensation beyond the number so entitled under the terms of the will or deed creating the trust or appointing a guardian or authorized by law. Whenever a person is joined with such trust company in any appointment as guardian, trustee or administrator with or without the will annexed, his appointment may be under such limitation of powers and upon such terms and conditions as to deposit of assets by such person, with such trust company, or otherwise, and upon such reduced bond or security to be given by such person, as the court, surrogate or judge, making the appointment, shall prescribe.

When application is made to any court or officer having authority to grant letters of administration with the will annexed upon the estate of any deceased person, and there is no person entitled to such letters who is qualified, competent, willing and able to accept such administration, such court or officer may at the request of any party interested in the estate, grant such letters of administration with the will annexed, to any such corporation.

Any court or officer having authority to grant letters of guardianship of any infant may upon the same appli-

cation as is required by law for the appointment of a guardian for such infant, appoint any such corporation as the guardian of the estate of such infant.

3. Committee of lunatic, et cetera. Any court having jurisdiction to appoint a trustee, guardian, receiver or committee of the estate of a lunatic, idiot or habitual drunkard, or to make any fiduciary appointment, may appoint any such corporation to be such trustee, guardian, receiver or committee, or to act in any other fiduciary capacity.

4. Receiver, trustee or committee. Any court, having jurisdiction to appoint a committee or trustee or a receiver in insolvency or bankruptcy proceedings or in any other proceeding, or action, under state or federal law, may appoint any such corporation to be such receiver, trustee or committee.

5. Depositary for moneys paid into court. All moneys brought into court by order or judgment of any court of record of this state, or of any other state or of the United States, may be deposited with any such corporation that has been designated a depositary by the comptroller of the State of New York, as provided by the code of civil procedure. Whenever any such corporation shall be designated by the comptroller as a depositary for funds and moneys paid into court, it shall give to the people of the state a bond in the form and manner prescribed in this chapter.

6. Bonds. No bond or other security, except as hereinafter provided, shall be required from any such corporation for or in respect to any trust, nor when appointed executor, administrator, guardian, trustee, receiver, committee or depositary or in any other fiduciary capacity. The court, or officer making such ap-

pointment may, upon proper application, require any corporation, which shall have been so appointed, to give such security as to the court or officer shall seem proper, or upon failure of such corporation to give security as required, may remove such corporation from and revoke such appointment.

7. Investments. All investments of money received by any such corporation, and by any trust company chartered by special act, prior to May eighteen, eighteen hundred and ninety-two, as executor, administrator, guardian, personal or testamentary trustee, receiver, committee or depositary, shall be at its sole risk, and for all losses of such money the capital stock, property and effects of the corporation shall be absolutely liable, unless the investments are such as are proper when made by an individual acting as trustee, executor, administrator, guardian, receiver, committee, depositary, or such as are permitted in and by the instrument or words creating or defining the trust.

8. Preference. If dissolved by the legislature or the court, or otherwise, or liquidated by the superintendent of banks or otherwise, the debts from such corporation as guardian, trustee, executor, administrator, committee or depositary, shall be entitled to priority of payment from the assets of such corporation on an equality with any other priority given by this chapter.

9. Court orders; accounts. Such court or officer may make orders respecting such trusts and require any trust company to render all accounts, which such court or officer might lawfully require if such executor, administrator, guardian, trustee, receiver, committee, depositary or such trust company acting in any other fiduciary capacity, were a natural person.



10. No official oath required. Upon the appointment of such trust company as such executor, administrator, guardian, trustee, receiver or committee, no official oath shall be required.

11. Interest. On all sums of money not less than one hundred dollars, which shall be collected and received by a trust company acting as executor, administrator, guardian, trustee, receiver or committee under the appointment of any court or officer, or in any fiduciary capacity under such appointment, or as a depository of moneys paid into court, interest shall be allowed by such trust company at not less than the rate of two per centum per annum until the moneys so received shall be duly expended or distributed. If such interest moneys, or any part thereof, shall not annually be expended or distributed pursuant to the terms or provisions of the trust under which such moneys are held, the amount thereof not so expended or distributed shall be accumulated by such trust company for the benefit of the parties interested in such trust fund, and shall be added to the principal to constitute a new principal upon which interest shall thereafter be computed.

**§ 189. Restrictions on Taking and Holding Real Estate.** All real estate purchased by any trust company or taken by it in settlement of debts due it, shall be conveyed to it directly by name and the conveyance immediately recorded, in the office of the proper recording officer of the county in which such real estate is located.

Every parcel of real estate purchased or acquired by any trust company shall be sold by it within five years of the date on which it shall have been acquired unless:

1. There shall be a building thereon occupied by it as an office; or

2. The superintendent of banks, on application of its board of directors, shall have extended the time within which such sale shall be made.

**§ 190. Restrictions on Loans, Purchases of Securities and Total Liabilities to Trust Company of Any One Person.** A trust company subject to the provisions of this article

1. Shall not directly or indirectly lend to any individual, partnership, unincorporated association, corporation or body politic, an amount which, including therein any extension of credit to such individual, partnership, unincorporated association, corporation or body politic, by means of letters of credit or by acceptances of drafts for, or the discount or purchase of the notes, bills of exchange or other obligations of, such individual, partnership, unincorporated association, corporation or body politic, will exceed one-tenth part of the capital stock and surplus of such trust company, with the following exceptions:

(a) The restrictions in this subdivision shall not apply to loans to, or investments in the interest bearing obligations of, the United States, this state or any city, county, town or village of this state.

(b) If such trust company is located in a borough having a population of two millions or over, the total liability to such trust company, of any state other than the State of New York, or of any foreign nation, or of a municipal or railroad corporation, or of a corporation subject to the jurisdiction of a public service commission of this state, may equal but not exceed twenty-five per centum of the capital and surplus of such trust company; and the total liabilities to such trust company of any individual, partnership, unincorporated association,

or of any other corporation or body politic, may equal but not exceed twenty-five per centum of the capital and surplus of such trust company, provided such liabilities are upon drafts or bills of exchange drawn in good faith against actually existing values, or upon commercial or business paper actually owned by the person negotiating the same to such trust company, and are endorsed by such person without limitation, or provided such liabilities in excess of ten per centum of such capital and surplus, and not in excess of an additional fifteen per centum of such capital and surplus, are secured by collateral having an ascertained market value of at least fifteen per centum more than the amount of the liabilities so secured.

(c) If such trust company is located elsewhere in the state, the total liability to such trust company of any state other than the State of New York, or of any foreign nation, or of a municipal or railroad corporation, or of a corporation subject to the jurisdiction of a public service commission of this state, may equal but not exceed forty per centum of the capital and surplus of such trust company; and the total liabilities to such trust company of any individual, partnership, unincorporated association, or of any other corporation or body politic, may equal but not exceed forty per centum of the capital and surplus of such trust company, provided such liabilities are upon drafts or bills of exchange drawn in good faith against actually existing values or upon commercial or business paper actually owned by the person negotiating the same to such trust company, and are endorsed by such person without limitation, or provided such liabilities in excess of ten per centum of such capital and surplus, and not in excess of an additional thirty

per centum of such capital and surplus, are secured by collateral having an ascertained market value of at least fifteen per centum more than the amount of the liabilities so secured.

(d) In computing the total liabilities of any individual to a trust company there shall be included all liabilities to the trust company of any partnership or unincorporated association of which he is a member, and any loans made for his benefit or for the benefit of such partnership or association; of any partnership or unincorporated association to a trust company there shall be included all liabilities of its individual members and all loans made for the benefit of such partnership or unincorporated association or any member thereof; and of any corporation to a trust company there shall be included all loans made for the benefit of the corporation.

This subdivision shall not be construed to render unlawful the continued holding of any securities heretofore lawfully acquired.

2. Shall not make any loans secured by the stock of another moneyed corporation if by the making of such loan the total stock of such other moneyed corporation owned and held as collateral security by it will exceed ten per centum of the total capital stock of such other moneyed corporation.

3. Shall not make any loan upon the securities of one or more corporations the payment of which loan is undertaken in whole or in part severally, but not jointly, by two or more individuals, firms or corporations:

(a) if the prospective borrowers or underwriters be obligated absolutely or contingently to purchase the securities, or any of them, collateral to the proposed

loan, unless they shall have paid on account of the purchase of such securities an amount in cash or its equivalent equal to at least twenty-five per centum of the several amounts for which they remain obligated in completing the purchase;

(b) if the trust company considering the making of the loan be liable directly, indirectly or contingently, for the repayment of the proposed loan or any part thereof;

(c) if the term of the proposed loan, including any renewal thereof, by agreement, express or implied, exceeds the period of one year;

(d) if the amount, under any circumstances, exceeds twenty-five per centum of the capital and surplus of the trust company.

4. Shall not make a loan, directly or indirectly, upon the security of real estate upon which there is a prior mortgage, lien or incumbrance, if the amount unpaid upon such prior mortgage, lien or incumbrance, or the aggregate amount unpaid upon all prior mortgages, liens and incumbrances exceeds ten per centum of the capital and surplus of such trust company, or if the amount so secured, including all prior mortgages, liens and incumbrances shall exceed two-thirds of the appraised value of such real estate as found by a committee of the directors of such trust company; but this provision shall not prevent the acceptance of any such real estate securities to secure the payment of a debt previously contracted in good faith. Every mortgage and every assignment of a mortgage taken or held by such trust company shall immediately be recorded in the office of the clerk or the proper recording officer of the county in which the real estate described in the mortgage is located.

5. Shall not, nor shall any of its directors, officers, agents or servants, directly or indirectly, purchase or be interested in the purchase of any promissory note or other evidence of debt issued by it, for less than its face value. Every trust company or person violating the provisions of this subdivision shall forfeit to the people of the state three times the face value of the note or other evidence of debt so purchased.

6. Shall not make any loan or discount on the security of the shares of its own capital stock, or be the purchaser or holder of any such shares, unless security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith, and stock so purchased or acquired shall be sold at public or private sale, or otherwise disposed of, within six months from the time of its purchase or acquisition. Any trust company violating any of the provisions of this subdivision shall forfeit to the people of the state twice the amount of the loan or purchase.

7. Shall not knowingly lend, directly or indirectly, any money or property for the purpose of enabling any person to pay for or hold shares of its stock, unless the loan is made upon security having an ascertained or market value of at least fifteen per centum more than the amount of the loan. Any trust company violating the provisions of this subdivision shall forfeit to the people of the state twice the amount of the loan.

8. Shall not, nor shall any officer thereof, lend directly or indirectly any sum of money to any officer, director, clerk or employe of the trust company without the written approval of a majority of the board of directors thereof filed in the office of the trust company or embodied in a resolution adopted by a majority vote of



such board, exclusive of the director to whom the loan is made, or in any event, to any officer thereof, if such trust company is located in a city of the first class; and if such officer, director, clerk or employe shall own or control a majority of the stock of any other corporation a loan to that corporation shall be considered for the purpose of this subdivision as a loan to him. Every trust company or officer thereof violating this provision shall, for each offense, forfeit to the people of the state twice the amount lent.

9. Shall not, directly or indirectly, make any loan exceeding in amount one-tenth of its capital stock to any director thereof.

10. Shall not invest or keep invested in the stock of any private corporation an amount in excess of ten per centum of the capital and surplus of such trust company; nor shall it purchase or continue to hold stock of another moneyed corporation if by such purchase or continued investment the total stock of such other moneyed corporation owned and held by it as collateral will exceed ten per centum of the stock of such other moneyed corporation, provided, however, that this limitation shall not apply to the ownership of the capital stock of a safe deposit company the vaults of which are connected with or adjacent to an office of such trust company.

**§ 191. Restrictions on Power to Contract or to Accept or Execute Trusts.** No trust company shall have any right or power to make any contract, or to accept or execute any trust whatever, which it would not be lawful for any individual to make, accept or execute.

**§ 192. Restriction on Power to Receive Deposits of Funds Paid Into Court.** No trust company shall

receive funds and moneys paid or brought into a court of the State of New York except it be designated by the comptroller of the State of New York a depository of moneys paid into court. Nothing in this chapter contained shall, however, be deemed to preclude the deposit, in any trust company organized under the laws of this state, of any funds pursuant to the order or direction of a court of any other state or of the United States making such trust company a depository of such funds.

**§ 193. Restrictions on Investments of Capital; How Valued.** The capital of every trust company shall be invested in bonds and mortgages on real property in this state otherwise unencumbered, not exceeding sixty per centum of the value thereof, or in the stocks, bonds or other obligations of this state, or of the United States, or of any county or incorporated city of this state, duly authorized by law to be issued.

Stocks or bonds constituting a part of the lawful investment of capital of any such corporation shall not be valued upon its books or entered in its reports to the superintendent of banks at a higher price or value than their investment value as determined by amortization, after providing in a manner approved by the superintendent of banks for the gradual extinction of premiums or discounts on all such securities so as to bring them to par at maturity.

**§ 194. Restrictions as to Entries in Books; Amortization of Securities.** 1. No trust company shall by any system of accounting or any device of book-keeping, directly or indirectly enter any of its assets upon its books in the name of any other individual, partnership, unincorporated association or corporation, or under any title or designation that is not truly descriptive thereof.

2. The stocks, bonds and other interest-bearing corporate securities purchased by a trust company shall be entered on its books at the actual cost thereof, and for the purpose of calculating the undivided profits applicable to the payment of dividends, such stocks and securities shall not be estimated at a valuation exceeding their present cost as determined by amortization, that is, by deducting from the cost of any such stock or security purchased for a sum in excess of the amount payable thereon at maturity, and charging to profit and loss, a sufficient sum to bring it to par at maturity, or adding to the cost of any such stock or security purchased at less than the amount payable thereon at maturity, and crediting to profit and loss, a sufficient sum to bring it to par at maturity; but nothing herein contained shall prevent a trust company from carrying such stocks, bonds and other interest-bearing corporate securities on its books at their market value.

3. No trust company shall, except with the written approval of the superintendent, enter or at any time carry on its books the real estate and the building or buildings thereon, used by it as its place or places of business, at a valuation exceeding their actual cost to such trust company.

4. Every trust company shall conform its method of keeping its books and records to such orders in respect thereto as shall have been made and promulgated by the superintendent pursuant to section fifty-six of this chapter. Any trust company that refuses or neglects to obey such order shall be subject to a penalty of one hundred dollars for each day it so refuses or neglects.

5. Every trust company holding any funds or money paid into court shall keep a book or books in

which it shall make an exact account thereof. Such book or books shall state the name of the court, the title of the case, the date of receipt, from whom received, the amount of money, if any, and a description of the securities or other property received, if any, and each addition of interest; also the date and description of each order for payment and the dates and amounts of payments thereunder and to whom paid; also an account of each change of investment, if any.

**§ 195. Restrictions on Branch Offices; Penalty for Violation.** No trust company or any officer or director thereof, shall transact its usual business at any place other than its principal place of business, except that a trust company may open and occupy in the city in which its principal place of business is located one or more branch offices, provided that before any such branch or branches shall be opened or occupied:

1. The superintendent shall have given his written approval, as provided in section fifty-one of this chapter.

2. The actual paid in capital of such trust company shall exceed by the sum of one hundred thousand dollars the amount required by section one hundred and eighty of this article for each branch opened.

Any trust company having a combined capital and surplus of one million dollars or over may with the written approval of the superintendent open and occupy a branch office or branch offices in one or more places located without the State of New York, either in the United States of America or in foreign countries.

**§ 196. Restrictions on Deposit of Trust Company's Funds.** No trust company shall deposit any of its funds with any other moneyed corporation unless the latter has been designated as a depository for the

trust company's funds by vote of a majority of the directors of the trust company exclusive of any director who is an officer, director or trustee of the depository so designated.

**§ 197. Reserves Against Deposits.** Every trust company shall maintain total reserves against aggregate demand deposits, as follows:

1. Fifteen per centum of such deposits if such trust company has an office in a borough having a population of two millions or over; and at least ten per centum of such deposits shall be maintained as reserves on hand.

2. Thirteen per centum of such deposits, if such trust company is located in a borough having a population of one million or over and less than two millions, and has not an office in a borough specified in subdivision one of this section; and at least eight per centum of such deposits shall be maintained as reserves on hand.

3. Ten per centum of such deposits, if such trust company is located elsewhere in the state. Trust companies located in cities of the first and second class, but not falling within subdivisions one or two of this section, shall maintain at least four per centum of such deposits as reserves on hand; and trust companies located in cities of the third class and in incorporated and unincorporated villages, shall maintain at least three per centum of such deposits as reserves on hand.

At least one-half of the reserves on hand shall consist of gold, gold bullion, gold coin, United States gold certificates or United States notes; and the remainder shall consist of any form of currency, other than federal reserve notes, authorized by the laws of the United States.

If any trust company shall have become a member of a federal reserve bank, it may maintain as reserves on deposit with such federal reserve bank such portion of its total reserves as shall be required of members of such federal reserve bank.

If any trust company shall fail to maintain its total reserves in the manner authorized by this section, it shall be liable to, and shall pay the assessment or assessments provided for in section thirty of this chapter.

**§ 198. Deposits of Minors and Trust Deposits and Deposits in the Names of More Than One Person.** When any deposit shall be made by or in the name of any minor, the same shall be held for the exclusive right and benefit of such minor, and free from the control or lien of all other persons, except creditors, and shall be paid, together with the interest thereon to the person in whose name the deposit shall have been made, and the receipt or acquittance of such minor shall be a valid and sufficient release and discharge for such deposit or any part thereof to the corporation. When any deposit shall be made by any person describing himself in making such deposit as trustee for another and no other or further notice of the existence and terms of a legal and valid trust than such description shall have been given in writing to the company in the event of the death of the person so described as trustee, such deposit or any part thereof, together with the dividends or interest thereon, may be paid to the person for whom the deposit was thus stated to have been made. When a deposit shall have been made by any person in the name of such depositor and another person and in form to be paid to either, or the survivor of them, such deposit thereupon and any additions thereto made, by either



of such persons, upon the making thereof, shall become the property of such persons as joint tenants, and the same, together with all interest thereon, shall be held for the exclusive use of the persons so named, and may be paid to either during the life time of both, or to the survivor after the death of one of them; and such payment and the receipt or acquittance of the one to whom such payment is made, shall be valid and sufficient release and discharge to said company, for all payments made on account of such deposit prior to the receipt by said company of notice in writing signed by any one of such joint tenants, not to pay such deposit in accordance with the terms thereof.

**§ 199. Interpleader in Certain Actions; Costs.**

1. In all actions against any trust company to recover for moneys on deposit therewith, if there be any person or persons, not parties to the action, who claim the same fund, the court in which the action is pending, may, on the petition of such trust company, and upon eight days' notice to the plaintiff and such claimants, and without proof as to the merits of the claim, make an order amending the proceedings in the action by making such claimants parties defendant thereto; and the court shall thereupon proceed to determine the rights and interests of the several parties to the action in and to such funds. The remedy provided in this section shall be in addition to and not exclusive of that provided in section eight hundred and twenty of the code of civil procedure.

2. The funds on deposit which are the subject of such action may remain with such trust company to the credit of the action until final judgment therein, and be entitled to the same interest as other deposits of the same class, and shall be paid by such trust company in accord-

ance with the final judgment of the court; or the deposit in controversy may be paid into court to await the final determination of the action; and when the deposit is so paid into court the trust company shall be struck out as a party to the action, and its liability for such deposit shall cease.

3. The costs in all actions against a trust company to recover deposits shall be in the discretion of the court, and may be charged upon the fund affected by the action.

**§ 200. Rate of Interest; Effect of Usury.** Every trust company may take, receive, reserve and charge on every loan and discount made, or upon any note, bill of exchange or other evidence of debt, interest at the rate of six per centum per annum; and such interest may be taken in advance, reckoning the days for which the note, bill or evidence of debt has to run. The knowingly taking, receiving, reserving or charging a greater rate of interest shall be held and adjudged a forfeiture of the entire interest which the note, bill of exchange or other evidence of debt carries with it, or which has been agreed to be paid thereon. If a greater rate of interest has been paid, the person paying the same or his legal representatives may recover twice the entire amount of the interest thus paid from the trust company taking or receiving the same, if such action is brought within two years from the time the excess of interest is taken. The purchase, discount or sale of a bona fide bill of exchange, note or other evidence of debt payable at another place than the place of such purchase, discount or sale at not more than the current rate of exchange for sight draft, or a reasonable charge for the collection of the same, in addition to the interest, shall not be considered

as taking or receiving a greater rate of interest than six per centum per annum. The true intent and meaning of this section is to place and continue such trust companies on an equality in the particulars herein referred to with the national banks organized under the act of Congress entitled "An act to provide a national currency, secured by pledges of United States bonds, and to provide for the circulation and redemption thereof," approved June the third, eighteen hundred and sixty-four.

**§ 201. Interest on Collateral Demand Loans of Not Less Than Five Thousand Dollars.** Upon advances of money repayable on demand to an amount not less than five thousand dollars made upon warehouse receipts, bills of lading, certificates of stock, certificates of deposit, bills of exchange, bonds or other negotiable instruments, pledged as collateral security for such repayment, any trust company may receive or contract to receive and collect as compensation for making such advances any sum which may be agreed upon by the parties to such transaction.

**§ 202. Calculation of Earnings for Dividend Period.** To determine the amount of gross earnings of a trust company for any dividend period the following items may be included:

1. All earnings actually received during such period, less interest accrued and unpaid included in the last previous calculation of earnings;

2. Interest accrued and unpaid upon debts owing to it secured by collateral as authorized by this article upon which no default of more than one year exists and upon corporate stocks, bonds, or other interest-

bearing obligations owned by it upon which no default exists;

3. The sums added to the cost of securities purchased for less than par as a result of amortization, provided the market value of such securities is at least equal to their present cost as determined by amortization;

4. Any profits actually received during such period from the sale of securities, real estate or other property owned by it;

5. Sums recovered on items previously charged off, and any amounts allowed by the superintendent on account of assets previously disallowed and charged off;

6. Provided the superintendent of banks shall have approved, and only to the extent of such approval, any increase in the book value of an office building owned by it, which building or a portion thereof is used by it as a place of business.

To determine the amount of net earnings for such dividend period the following items shall be deducted from gross earnings:

1. All expenses paid or incurred, both ordinary and extraordinary, in the transaction of its business, the collection of its debts, and the management of its affairs, less expenses incurred and interest accrued upon its debts deducted at the last previous calculation of net earnings for dividend purposes;

2. Interest paid, or accrued and unpaid, upon debts owing by it;

3. The amounts deducted through amortization from the cost of corporate stocks, bonds or other interest-bearing obligations purchased above par in order to bring them to par at maturity;

4. All losses sustained by it. In the computation of such losses all debts owing to it shall be included upon which no interest shall have been paid for more than two years or on which a judgment has been recovered which shall have remained unsatisfied for two years; and such other assets as shall have been disallowed by the superintendent of banks, or by its board of directors.

The balance thus obtained shall constitute the net earnings of such trust company for such period.

**§ 203. Surplus Fund; Of What Composed, and for What Purposes Used.** Every trust company shall create a fund to be known as a surplus fund. Such fund may be created or increased by contributions, by transfers from undivided profits, or from net earnings. Such fund shall up to twenty per centum of the capital of the trust company be used only for the payment of losses in excess of undivided profits.

**§ 204. How Net Earnings Credited for Dividend Purposes; Credits to Surplus Fund and to Undivided Profits; Dividends to Stockholders.** When the net earnings of a trust company have been determined at the close of a dividend period as provided in section two hundred two of this article, if its surplus fund does not equal twenty per centum of the trust company's capital, one-tenth of such net earnings shall be credited to the surplus fund or so much thereof, less than one-tenth, as will make such fund equal twenty per centum of such capital. The balance of such net earnings, or the entire amount thereof if such fund equals such twenty per centum, may be credited to the trust company's profit and loss account; or, if its expenses and losses for such

dividend period exceed its gross earnings, such excess shall be charged to its profit and loss account. The credit balance of such account shall constitute the undivided profits at the close of such dividend period, and shall be available for dividends.

The directors of any trust company may annually, \*semi-annually or quarterly, but not more frequently, declare such dividends as they shall judge expedient from such undivided profits. No trust company shall declare, credit or pay any dividends to its stockholders until it shall have made good any existing impairment of its capital and any existing encroachment on its reserves required to be maintained against deposits.

**§ 205. Change of Location.** Any trust company may make a written application to the superintendent of banks for leave to change its place of business to another place in the same county. The application shall state the reasons for such proposed change, and shall be signed and acknowledged by a majority of its board of directors and accompanied by the written assent thereto of stockholders owning at least two-thirds in amount of its stock. If the proposed place of business is within the limits of the village, borough or city, if in a city not divided into boroughs, in which the principal place of business of the trust company is located, such change may be made upon the written approval of the superintendent; if beyond such limits, notice of intention to make such application, signed by the president and another principal officer of the trust company shall be published once a week for two successive weeks imme-

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\*So in original.



diately preceding such application in a newspaper published in the City of Albany, in which notices by state officers are required by law to be published, and in a newspaper to be designated by the superintendent, published in the county in which the place of business of such trust company is located. If the superintendent shall grant his certificate authorizing the change of location, as provided in section fifty of this chapter, the trust company shall cause such certificate to be published once in each week for two successive weeks in the newspaper in which the notice of application was published. When the requirements of this section shall have been fully complied with, the trust company may, upon or after the day specified in the certificate, remove its property and effects to the location designated therein, and thereafter its principal place of business shall be the location so specified; and it shall have all the rights and powers in such new location which it possessed at its former location.

**§ 206. Rights and Liabilities of Stockholders; Who Liable as Stockholders; Who May Enforce Liability; Within What Time Action Must Be Commenced.** The rights, powers and duties of stockholders of trust companies shall be as prescribed in the general corporation law and the stock corporation law; but the individual liability of such stockholders for the contracts, debts, and engagements of the trust company and the time within which an action may be instituted to enforce such liability shall be governed exclusively by the provisions of this section and section eighty of this chapter.

The stockholders of every trust company shall be

individually responsible, equally and ratably and not one for another, for all contracts, debts and engagements of the trust company, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. An action to enforce such liability must be brought within six years after the cause of action has accrued. The term "stockholder" as used in this section shall apply to:

1. Such persons as appear by the books of the trust company to be stockholders;

2. Every owner of stock, legal or equitable, although the same may be on such books in the name of another person, provided, however, that such term shall not apply to a person holding stock as collateral security for the payment of a debt and not appearing by the books of the trust company to be the owner and holder thereof in his own right, or to a person holding stock in a bona fide fiduciary capacity and not appearing by the books of the trust company to be the owner and holder thereof in his own right unless such fiduciary shall have invested the funds in his care in violation of law or of the terms under which said funds are held by him, in which case he shall be personally liable as a stockholder.

No person who has in good faith, and without any intent to evade his liability as a stockholder, caused his stock to be transferred on the books of the trust company when such trust company is solvent to any resident of this state of full age previous to any default in the payment of any debt or liability of the trust company, shall be subject to any personal liability for any contracts, debts or engagements of the trust company.

In case the superintendent of banks shall have taken possession of the property and business of the trust company pursuant to section fifty-seven of this chapter or a permanent receiver of such trust company shall have been appointed, all actions or proceedings to enforce the liability of stockholders under this section shall be taken and prosecuted only in the name of the superintendent or the receiver, as the case may be, unless the superintendent or receiver shall refuse to take such action or proceeding upon proper request in writing made by any creditor, or shall have failed or neglected to commence such action or proceeding within sixty days after the receipt of such request, and in that event such action or proceeding may be taken by any creditor of the trust company. But no such action shall be brought by a creditor until a judgment shall have been recovered by him against the trust company and an execution thereon shall have been returned unsatisfied in whole or in part.

**§ 207. Assessment of Stockholder to Make Good Impairment of Capital; Sale of Stock.** Whenever the superintendent of banks shall have made requisition upon any trust company pursuant to section fifty-six of this chapter to make good the amount of an impairment of its capital, the directors of the trust company shall immediately give notice of such requisition to each stockholder and of the amount of the assessment which he must pay for the purpose of making good such deficiency, by a written or printed notice mailed to such stockholder at his place of residence, or served personally upon him. If any stockholder shall refuse or neglect to pay the assessment specified in such notice within sixty days from the date thereof, the directors of such trust company shall have the right to sell to the highest

bidder at public auction the stock of such stockholder, after giving previous notice of such sale for two weeks in a newspaper of general circulation published in the county where the principal office of such trust company is located; or such stock may be sold at private sale, and without such published notice, provided, however, that before making a private sale thereof an offer in writing to purchase such stock shall first be obtained, and a copy thereof served upon the owner of record of the stock sought to be sold either personally or by mailing a copy of such offer to such owner at his place of residence or the address furnished by him to the trust company; and if, after service of such offer, such owner shall still refuse or neglect to pay such assessment within two weeks from the time of service of such offer, the said directors may accept such offer and sell such stock to the person or persons making such offer, or to any other person or persons making a larger offer than the amount named in the offer submitted to such stockholder; but said stock shall in no event be sold for a smaller sum than the valuation put on it by the superintendent in his determination and certificate, which valuation shall not be less than the amount of the assessment called for and the necessary costs of sale. Out of the avails of the stock sold the directors shall pay the necessary costs of sale and the amount of the assessment called for thereon. The balance, if any, shall be paid to the person or persons whose stock has been thus sold. A sale of stock as herein provided shall effect an absolute cancellation of the outstanding certificate or certificates evidencing the stock so sold, and shall render the same null and void and a new certificate or certificates shall be issued to the purchaser or purchasers of said stock.

**§ 208. Number of Directors; Classification; Tenure of Office of Original Directors.** The affairs of every such trust company shall be managed and its corporate powers exercised by a board of directors of such number, not less than seven nor more than thirty, as shall from time to time be prescribed in its by-laws.

The persons named in the organization certificate, or such of them respectively, as shall become holders of at least ten shares of such stock, shall constitute the first board of directors, and may add to their number not exceeding the limit of thirty, and shall severally continue in office until others are elected to fill their respective places. Within six months from the time when such trust company shall commence business, the first board of directors shall classify themselves by lot into three classes as nearly equal as may be. The term of office of the first class shall expire on the third Wednesday of January next following such classification. The term of office of the second class shall expire one year thereafter; and the term of office of the third class shall expire two years thereafter; provided that all directors whose term of office shall expire as heretofore provided shall none the less continue in office until their successors are elected as hereinafter provided.

**§ 209. Annual Meeting of Stockholders; Notice.** At or before the expiration of the term of the first class, and annually thereafter, a number of directors shall be elected by the stockholders equal to the number of directors whose term will then expire who shall hold their offices for three years, or until their successors are elected, and at such election, the stockholders may fill for the balance of the unexpired term any vacancy which has occurred in the office of any other director and which



vacancy has not been filled by the directors of the company. Such election shall be held at the principal place of business of the company. Notice of the time and place of holding the stockholders' meeting for the election of directors and for action upon such other matters as may be brought before such meeting, shall be given by publication thereof at least once in each week for two successive weeks immediately preceding such election, in a newspaper published in the county, approved by the superintendent of banks, where such election is to be held, and in such other manner as may be prescribed in the by-laws.

**§ 210. Qualifications and Disqualifications of Directors.** Every director of a trust company shall be a stockholder of the trust company owning in his own right at least ten shares of its capital stock; and every person elected to be a director who, after such election, shall hypothecate, pledge or cease to be the owner in his own right of the amount of stock aforesaid, shall cease to be a director of the trust company and his office shall be vacant, and he shall not be eligible for re-election as a director for a period of one year from the date of the next succeeding annual meeting.

**§ 211. Oath of Directors.** Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of the trust company, and will not knowingly violate, or willingly permit to be violated, any of the provisions of law applicable to such trust company, and that he is the owner in good faith and in his own right, of the number of shares of stock required by this article, subscribed by him or standing in his name on the books of the trust company and that the same



is not hypothecated, or in any way pledged as security for any loan or debt, and, in case of re-election or re-appointment, that such stock was not hypothecated, or in any way pledged as security for any loan or debt during his previous term. Such oath shall be subscribed by the director making it, and certified by an officer authorized by law to administer oaths, and immediately transmitted to the superintendent of banks.

**§ 212. Failure to Elect; When Vacancies Filled by Board.** In case of failure to elect any director on the day named, the directors whose terms of office do not that year expire may proceed to elect a number of directors equal to the number in the class whose term that year expires or such number as may have failed of re-election. The persons so elected, together with the directors whose terms of office shall not that year expire shall constitute the board until another election shall be held according to law. Vacancies occurring in the intervals of elections shall be filled by the board of directors for the balance of the unexpired term.

**§ 213. Annual Meeting of Directors; Election of Officers.** Within fifteen days after the date on which the annual meeting of stockholders is held its directors shall, after their due qualification, hold a meeting at which they shall elect a president from their own number, a vice-president, and such other officers as are required by the by-laws to be elected annually.

**§ 214. Monthly Meetings of Directors; Quorum; Statement to Directors.** The directors of every trust company shall hold a regular meeting at least once in each month. If the number of directors necessary to constitute a quorum is not prescribed in the certificate of incorporation or organization certificate, or in the by-

laws, and no provision is made therein for determining the same, the directors may fix such number, which shall not be less than one-third of all the directors and in no case less than five, with the same effect as if such number were prescribed in the certificate of incorporation or organization certificate. The board of directors shall by resolution duly recorded in the minutes, designate an officer or officers whose duty it shall be to prepare and submit to each director at each regular meeting of the board, or to an executive committee of not less than five members of such board, a written statement of all the purchases and sales of securities, and of every discount, loan or other advance, including overdrafts and renewals made since the last regular meeting of the board, describing the collateral to such indebtedness as of the date of meeting at which such statement is submitted; but such officer or officers may omit from such statement discounts, loans or advances including overdrafts and renewals of less than one thousand dollars excepting as hereinafter provided. Such statement shall also contain a list giving the aggregate of loans, discounts and advances including overdrafts to each individual partnership, unincorporated association, corporation or person whose liability to the trust company has been increased one thousand dollars or more since the last regular meeting of the board, together with a description of the collateral to such indebtedness held by the trust company at the date of the meeting at which such statement is submitted. A copy of such statement, together with a list of the directors present at such meeting, verified by the affidavit of the officer or officers charged with the duty of preparing and submitting such statement shall be filed with the records of the trust com-

pany within one day after such meeting, and be presumptive evidence of the matters therein stated.

**§ 215. Examinations by Directors Into Affairs of Trust Company; May Employ Assistants.** It shall be the duty of the board of directors of every trust company during the months of March or April and during the months of September or October in each year to examine, or to cause a committee of at least three of its members to examine fully the books, papers and affairs of the trust company, and the loans and discounts thereof, and particularly the loans or discounts made directly or indirectly to its officers or directors, or for the benefit of such officers or directors or for the benefit of other corporations of which such officers or directors are also officers or directors, or in which they have a beneficial interest as stockholders, creditors, or otherwise, with the special view of ascertaining their safety and present value, and the value of the collateral security, if any, held in connection therewith, and into such other matters as the superintendent of banks may require. Such directors shall have the power to employ such assistance in making such examination as they may deem necessary.

**§ 216. Reports of Directors' Examinations; Penalty for Failure to Make or File.** On or before the fifteenth day of the month of May or November succeeding any examination made pursuant to the requirements of the last section, a report in writing thereof, sworn to by the directors making the same, shall be made to the board of directors of such trust company, and placed on file in said trust company, and a duplicate thereof filed in the office of the superintendent of banks. Such report shall particularly contain a statement of

the assets and liabilities of the trust company examined, as shown by the books, together with such deductions from the assets, and the addition of such liabilities, direct, indirect, contingent or otherwise as such directors or committee, after such examination, may find necessary in order to determine the true condition of the trust company. It shall also contain a statement showing in detail every known liability to such trust company, direct, indirect, contingent, or otherwise, of every officer or director thereof and of every corporation in which any such officer or director owns stock to the amount of twenty-five per centum of the total outstanding stock, or of which any such officer or director is also an officer or director. It shall also contain a statement, in detail, of loans, if any, which in their opinion are doubtful or worthless, together with their reasons for so regarding them; also a statement of loans made on collateral security which in their opinion are insufficiently secured, giving in each case the amount of the loan, the name and market value of the collateral, if it has any market value, and, if not, a statement of that fact, and its actual value as nearly as possible. Such report shall also contain a statement of overdrafts, of the names and amounts of such as they consider worthless or doubtful, and a full statement of such other matters as affect the solvency and soundness of the institution. If the directors of any trust company shall fail to make, or to cause to be made, or to file such report of examination in the manner and within the time specified, such trust company shall forfeit to the people of the state one hundred dollars for every day such report shall be delayed.

**§ 217. Communications From Banking Department Must Be Submitted to Directors and Noted in**

**Minutes.** Each official communication directed by the superintendent of banks or one of his deputies to a trust company or to any officer thereof, relating to an examination or investigation conducted by the banking department or containing suggestions or recommendations as to the conduct of the business of the trust company, shall be submitted, by the officer receiving it, to the board of directors at the next meeting of such board, and duly noted in the book containing the minutes of the meetings of such board.

**§ 218. Reports to Superintendent; Penalty for Failure to Make.** Within ten days after service upon it of the notice provided for by section forty-two of this chapter, every trust company shall make a written report to the superintendent, which report shall be in the form and shall contain the matters prescribed by the superintendent and shall specifically state the items of capital, deposits, specie and cash items, public securities and private securities, real estate and real estate securities, and such other items as may be necessary to inform the public as to the financial condition and solvency of the trust company, or which the superintendent may deem proper to include therein, and shall also state the amount of deposits the payment of which, in case of insolvency, is preferred by law or otherwise over other deposits. Every such report shall be verified by the oaths of the president or vice-president and another principal officer of the trust company, and such verification shall state that the report is true and correct in all respects to the best of the knowledge and belief of the persons verifying it, and that the usual business of the trust company has been transacted at the location required by this article and not elsewhere. Every such report exclusive



of the verification shall, within thirty days after it shall have been filed with the superintendent, be published by the trust company in one newspaper of the place where its principal place of business is located, if there be one; if not, then in the newspaper published nearest where such trust company is located.

Every such trust company shall also make such other special reports to the superintendent as he may from time to time require, in such form and at such date as may be prescribed by him, and such report shall, if required by him, be verified in such manner as he may prescribe.

Every such trust company, within ten days after declaring a dividend, shall make a written report to the superintendent stating the amount of such dividend, the amount of its net earnings in excess thereof and the amount carried to the surplus fund. Such report shall be verified by the oath of the president or vice-president and another principal officer of the trust company.

If any such trust company shall fail to make any report required by this section on or before the day designated for the making thereof, or shall fail to include therein any matter required by the superintendent, such trust company shall forfeit to the people of the state the sum of one hundred dollars for every day that such report shall be delayed or withheld, and for every day that it shall fail to report any such omitted matter, unless the time therefor shall have been extended by the superintendent as provided by section forty-nine of this chapter. The moneys forfeited by this section, when recovered, shall be paid into the state treasury to reimburse the state for the sums advanced by it for the expenses of the department.



§ 219. **Annual Report of Unclaimed Deposits, Dividends and Interest; Publication; Penalty for Non-Compliance.** In the month of September in each year, and on or before the tenth day thereof, every trust company shall make a written report to the superintendent of banks, verified by the oaths of the president or vice-president and one other principal officer of the trust company, which report shall contain a true and accurate statement of all deposits made with the trust company and all dividends declared and interest accrued upon any of its stock or other evidences of indebtedness, which on the first day of August preceding such report amounted to fifty dollars or over and had remained unclaimed by any person or persons authorized to receive the same for five years then next preceding. Such statement shall set forth the date of each such deposit, its amount and the name and last known place of residence or postoffice address of the person making it, the name of each person in whose favor and the time when any such dividend may have been declared or any such interest may have accrued, its amount, and upon what number of shares or upon what amount of stock or other evidences of indebtedness of such trust company it was declared or accrued. In case any such trust company shall at said date have held no such unclaimed deposits, dividends or interest, it shall at the time above specified make a written report to the superintendent so stating, which report shall be verified as hereinabove provided. No deposits, dividends or interest shall be deemed unclaimed within the meaning of this section if it appears from the books of the trust company or from other written evidence on file with the trust company that the person or persons authorized to receive them have knowledge thereof.

Every such trust company which reports any unclaimed deposits, dividends or interest under the provisions of this section shall cause to be published once in each week for two successive weeks in a newspaper designated by the superintendent published in the county and in the village or city in which such trust company is located, if there be a newspaper published therein, and at least once in a newspaper published at Albany in which notices by state officers are required to be published, a true copy of such report, and shall file with the superintendent of banks on or before the first day of October in each year proof by affidavit of such publication. The expense of such publication shall be paid by the trust company, but if, on or before the first day of August in that year, the trust company shall have mailed, postage prepaid, to each person authorized to receive any such unclaimed deposit, dividend or interest, at his last known place of residence or postoffice address, a statement showing the amount to which such person is entitled and requesting written acknowledgment thereof, the trust company may reimburse itself for such expense by deducting the amount thereof from the sums due any such person or persons who shall not have made written acknowledgment before the filing of such report with the superintendent, in the proportion that each such sum bears to the aggregate thereof.

Any such trust company failing to make any report or to file any affidavit of publication required by this section shall forfeit to the people of the state the sum of one hundred dollars for each day such report or the filing of such affidavit of publication shall be so delayed or withheld, unless the time therefor shall have been extended by the superintendent as provided by section forty-nine of this chapter.

**§ 220. Liability of Trust Company for Assessments by Superintendent.** When the superintendent, pursuant to the powers conferred on him by article two of this chapter, shall have levied any assessment upon any trust company and shall have duly notified such trust company of the amount thereof, the amount so assessed shall become a liability of and shall be paid by such trust company to the superintendent.

**§ 221. Preservation of Books and Records of Trust Company.** Every trust company shall preserve all its records of final entry including cards used under the card system, and deposit tickets, for a period of at least six years from the date of making the same or from the date of the last entry thereon.

**§ 222. Restrictions on Officers, Directors and Employees.** No officer, director, clerk or other employee of any trust company, and no person in any way interested or concerned in the management of its affairs, shall as individuals discount, or directly or indirectly, make any loan upon any note or other evidence of debt, which he shall know to have been offered for discount to such trust company and to have been refused. Every person violating the provisions of this subdivision shall, for each offense, forfeit to the people of the state twice the amount of the loan which he shall have made.

No officer, director, clerk or other employee of any trust company shall borrow, directly or indirectly, from the trust company with which he is connected any sum of money without the written approval of a majority of the board of directors thereof filed in the office of the trust company or embodied in a resolution adopted by a majority of such board exclusive of the director to whom the loan is made; and in no event shall any officer of a

trust company located in a city of the first class borrow any sum of money from such trust company. If an officer, director, clerk or other employee of any trust company shall own or control a majority of the stock of any other corporation, a loan to that corporation shall be considered for the purpose of this subdivision as a loan to such officer, director, clerk or other employee. Every person knowingly violating this provision shall, for each offense, forfeit to the people of the state twice the amount which he shall have borrowed.

**§ 223. Prohibition Against Encroachments Upon Powers of Trust Companies.** No corporation other than a trust company organized under the laws of this state shall have or exercise in this state the power to receive deposits of money, securities or other personal property from any person or corporation in trust, or have or exercise in this state any of the powers specified in subdivisions one, four, five, six, seven and eight of section one hundred eighty-five of this article, nor have or maintain an office in this state for the transaction of, or transact, directly or indirectly, any such or similar business, except that a federal reserve bank may exercise the powers conferred by subdivision one of such section if authorized so to do by the laws of the United States, and any domestic corporation legally exercising any of the powers conferred by such subdivision at the time this act takes effect may continue to exercise such powers, and a trust company incorporated in another state may be appointed and may accept appointment and may act as executor of, or trustee under, the last will and testament of any deceased person in this state, provided trust companies of this state are permitted to act as such executor or trustee in the state where such for-

eign corporation has his domicile, and such foreign corporation shall have executed and filed in the office of the superintendent of banks a written instrument appointing such superintendent in his name of office, its true and lawful attorney upon whom all process in any action or proceeding against such executor or trustee, affecting or relating to the estate represented or held by such executor or trustee or the acts or defaults of such corporation in reference to such estate, with the same effect as if it existed in this state and had been lawfully served with process therein, and shall also have filed in the office of the superintendent a copy of its charter by its secretary under its corporate seal, together with the post-office address of its principal office.

No foreign corporation, having authority to act as executor of or trustee under the last will and testament of any deceased person, shall establish or maintain directly or indirectly any branch office or agency in this state or shall in any way solicit directly or indirectly any business as executor or trustee therein. If any such foreign corporation violates this provision, such foreign corporation shall not thereafter be appointed or act as executor or trustee in this state. The validity of any mortgage heretofore given by a foreign corporation to a trust company doing business within the foreign domicile of such mortgagor to secure the payment of an issue of bonds shall not be affected by any of the provisions of this section and such mortgage shall be enforceable in accordance with the laws of this state against any property covered thereby within the state of New York.

## Instructions and Forms for Organizing a Trust Company Under the Laws of New York

(Issued by Superintendent of Banks, Albany, N. Y.)

### PROCEDURE FOR THE ORGANIZATION OF A TRUST COMPANY

#### Chapter 2 of the Consolidated Laws

1. Execution by incorporators of notice of intention to organize and organization certificate in duplicate. Sections 180-181.

2. Filing of notice of intention to organize with Superintendent with request for designation of newspaper in which to publish same. In order to assist the Superintendent in making the investigation hereafter required and to expedite same, it is advisable to submit at the same time a statement with reference to the need for such an institution and two references (banking references preferred) for each incorporator. Sections 20 and 23.

3. Designation of newspaper in which to publish notice of intention to organize. Section 20.

4. Publication of notice of intention. Section 181.

5. Service of notice of intention. Section 181.

6. Submission of organization certificate in duplicate to Superintendent of Banks accompanied by proof of publication and of service of notice of intention. Section 182.



7. Filing of duplicate organization certificates for examination. Section 22.

8. Investigation by the Superintendent of Bank and approval or refusal. Section 23.

9. Filing of duplicate organization certificates. Section 23.

10. Payment of capital. Section 183.

11. Organization as corporation. Section 183.

12. Examination by Superintendent as to payment of capital and report. Section 24.

13. Filing of affidavit of payment of capital in County Clerk's office and certified copy in office of Superintendent of Banks. Section 183.

14. Payment of organization tax and filing of duplicate receipts with Superintendent of Banks and County Clerk. Section 180 of Tax Law.

15. Filing of verified list of stockholders in the office of the Superintendent. Section 183.

16. Deposit of bonds with Superintendent. Sections 183 and 184.

17. Filing oaths of directors with Superintendent. Section 211.

18. Authorization certificate to be issued by the Superintendent and filed and recorded in the office of the Superintendent and of the County Clerk. Section 24.

#### NOTICE OF INTENTION TO ORGANIZE

THE ..... TRUST COMPANY

We, the undersigned, hereby give notice of our intention to organize a Trust Company, under and pursuant to the laws of the State of New York, and, in conformity with the statute in such case made and provided, we hereby specify and state as follows, to wit:—

FIRST. The names of the proposed incorporators are:

.....  
.....  
.....  
.....  
.....  
.....  
.....  
.....  
.....  
.....  
.....

SECOND. The name of the proposed Trust Company is .....

THIRD. The location of the proposed Trust Company is to be.....

FOURTH. The amount of its capital stock is..... Dollars.

In witness whereof we have hereunto affixed our signatures this.....day of....., 191

.....  
.....  
.....  
.....  
.....  
.....  
.....  
.....  
.....  
.....

(Attach Copy of Notice Here.)

PROOF OF SERVICE OF NOTICE OF INTENTION TO ORGANIZE

..... STATE OF NEW YORK, { ss. County of .....

....., being duly sworn, deposes and says that he is upwards of twenty-one years of age, and resides at No. .... in the ..... of .....; that on the ..... day of ....., 191.., he served a copy of the annexed notice of intention to organize ..... upon each State Bank and Trust Company hereinafter named by mailing to each of such State Banks and Trust Companies a true copy of said notice at the post-office in the.....of.....inclosed in a sealed envelope and directed to each of such State Banks and Trust Companies at their postoffice addresses, and prepaying the proper postage on each of said notices so mailed, as follows, to wit:

.....  
.....  
.....  
.....  
.....  
.....  
.....

..... Sworn to before me this..... day of....., 191..

.....  
.....



elected to act as such when authorized by the provisions of the Banking Law of the State of New York.

IN WITNESS WHEREOF, We have made, signed and acknowledged this certificate in duplicate, this . . . . day of . . . . . 191 . . .

. . . . .  
. . . . .  
. . . . .  
. . . . .  
. . . . .  
. . . . .

STATE OF NEW YORK, }  
County of . . . . . } ss.

On this . . . . . day of . . . . ., 19 . . . personally appeared before me . . . . .

. . . . .  
. . . . .  
. . . . .  
. . . . .  
. . . . .

to me known to be the persons described in and who executed the foregoing certificate, and severally acknowledged that they executed the same.

. . . . .  
(Attach County Clerk's certificate authenticating signature of Notary Public who takes acknowledgments.)

VERIFIED LIST OF STOCKHOLDERS OF

. . . . .

STATE OF NEW YORK, }  
County of . . . . . } ss.

..... and  
 ....., being  
 severally duly sworn, do, each for himself, depose and  
 say that the said..... is the  
 President of....., located at  
 the city of..... and that said  
 ..... is the Treasurer  
 of the said Company; that they, the said deponents, are  
 the principal officers of the said Company; that annexed  
 hereto and marked "Schedule A" is a true and correct  
 list of the stockholders of said.....  
 with the residence, postoffice address and number of  
 shares of stock held by each of them respectively.  
 Subscribed and severally sworn to before me  
 this..... day of..... 191...

.....  
 .....  
 .....  
 .....

AFFIDAVIT OF PAYMENT OF CAPITAL STOCK

STATE OF NEW YORK, }  
 COUNTY OF ..... } ss.

.....  
 being severally duly sworn say, and each for himself  
 says, that deponent is a resident of the.....  
 of..... County, N. Y.; that said  
 ..... is President of and said  
 .....  
 is ..... of .....  
 a corporation lately organized at..... N. Y.;  
 that the capital stock of said corporation is the sum of  
 ..... and is divided into.....



shares of.....each; and that the whole amount of said capital stock, to wit: the sum of..... has been in good faith subscribed and has been paid in, in cash.

.....  
.....

Subscribed and sworn to before me this.....day of.....191..

.....  
.....

[SEAL OF NOTARY]

OATH OF DIRECTORS

STATE OF NEW YORK, }  
COUNTY OF .....} ss.

.....  
.....  
.....  
.....  
.....

having been elected as directors of the..... Trust Company, being severally duly sworn, each for himself says that he is the owner in good faith and in his own right of the number of shares of the stock of said trust company required by Section 211, Chapter 369, of the Laws of 1914; that said stock is now standing in his name on the books of the said trust company; that the same is not hypothecated or in any way pledged as security for any loan or debt; that such stock was not hypothecated or in any way pledged as security for any loan or debt during his previous term; and that he will, so far as the duty devolves upon him, diligently and hon-

estly administer the affairs of said corporation, and will not knowingly violate or willingly permit to be violated any of the provisions of law applicable to such corporation.

Severally subscribed and sworn to by all deponents before me, this . . . . . day of . . . . . 191 . . .

. . . . .  
. . . . . :  
[SEAL OF NOTARY] . . . . .  
. . . . .  
. . . . .

Date of annual meeting . . . . .  
Total number of directors prescribed by your by-laws . . . . .

CLASS EXPIRING IN YEAR 1916  
NAMES

. . . . .  
. . . . .  
. . . . .  
. . . . .  
. . . . .

CLASS EXPIRING IN YEAR 1917

. . . . .  
. . . . .  
. . . . .  
. . . . .  
. . . . .

CLASS EXPIRING IN YEAR 1918

. . . . .

.....  
.....  
.....  
.....  
.....

THE OATHS OF DIRECTORS filed in 1915, except in cases of *filling vacancies*, should coincide with list of names given above as constituting the class of 1918. When transmitting oaths of Directors chosen to fill vacancies, state whom such Directors succeed, and in which class they belong.

The total number of Directors expiring in the three classes must equal the number of Directors prescribed by your by-laws.

In cases other than a re-election or reappointment the words in the oath, "that such stock was not hypothecated or in any way pledged as security for any loan or debt during his previous term," should be erased.

Precedents Showing Amendments to Charter of a  
New York Trust Company

CHANGE IN CORPORATE NAME

At a Special Term of the Supreme Court held at the County Court House in the City of New York on the 3rd day of December, 1895.

PRESENT: HON. GEORGE P. ANDREWS, Justice.

In the Matter of the Application  
of

The New York Guaranty and  
Indemnity Company for leave  
to change its name.

Upon reading the petition, heretofore filed, of the New York Guaranty and Indemnity Company, a corporation having its principal business office in the City of New York, for leave to change its name and to assume the name of *Guaranty Trust Company of New York*; and upon reading and filing the approval of the said petition by the Superintendent of Banks, and by the Superintendent of Insurance, and upon filing the affidavits of David S. Owen and Morris Van Vliet showing that notice of the application for this order has been published in the New York Law Journal and in the New York Evening Post once a week for six successive weeks prior to the said application, and the court being satisfied that this application has been made in pursuance of a resolution of the Board of Directors of the said

Company, and that the said petition is true, and that there is no reasonable objection to the granting thereof; Now on motion of Lawrence Godkin, attorney for the petitioner, it is

ORDERED, That the said petition be, and the same hereby is granted, and that the New York Guaranty and Indemnity Company be authorized to assume the name of *Guaranty Trust Company of New York*, on and after the 2nd day of January, 1896, upon filing a copy of this order and the papers upon which it is granted, with the Clerk of the County of New York, within ten days from the date hereof, and upon filing a certified copy of this order, within ten days from the entry thereof, in the office of the Secretary of State, of the Superintendent of Banks, and of the Superintendent of Insurance respectively. And it is further

ORDERED, That this order be published within ten days after the entry thereof once in each week for four successive weeks in the New York Law Journal, a daily newspaper printed in the County of New York.

Enter

GEORGE P. ANDREWS,

J. S. C.

(Seal)

A copy.

HENRY D. PURROY,

Clerk.

### Increase in Number of Directors

STATE OF NEW YORK, BANKING DEPARTMENT

In the matter of the proposed  
increase of the number of di-  
rectors of the Guaranty Trust  
Company.

I, JOHN W. WHEELOCK, Second Deputy Superintendent of Banks of the State of New York, DO HEREBY CONSENT that the number of directors of the GUARANTY TRUST COMPANY, New York City, be increased from twenty-one (21), the present number, to twenty-seven (27), upon compliance with the provisions of Section 21 of the Stock Corporation Law.

WITNESS, my hand and official seal of the Superintendent of Banks at the City of Albany, this twenty-sixth day of November, in the year of our Lord one thousand nine hundred and four.

JOHN. W. WHEELOCK,

Second Deputy Superintendent of Banks.

(Seal)

TRANSCRIPT OF PROCEEDINGS OF SPECIAL MEETING OF THE GUARANTY TRUST COMPANY OF NEW YORK, HELD TO DETERMINE WHETHER THE NUMBER OF DIRECTORS OF THE SAID TRUST COMPANY SHALL BE INCREASED FROM TWENTY-ONE, THE PRESENT NUMBER, TO TWENTY-SEVEN.

WE, the undersigned, John W. Castles, President, and Edgar C. Hebbard, Secretary, respectively, of a Special Meeting of stockholders of Guaranty Trust Company of New York, a domestic stock corporation formed under Chapter 179 of the Laws of 1864 of the State of New York and the several acts amending thereof and supplemental thereto, DO HEREBY CERTIFY:

That said Special Meeting was duly called in the manner provided by law and was held at the usual place of meeting of the Directors of said Trust Company, and that proof of the due service of notice in writing of such meeting personally or by mail, directed to each stockholder of record at his last known postoffice address,



was filed in the office of the corporation at or before the time of such meeting.

That the proceedings of such Special Meeting have been duly entered in the minutes of the corporation and that the following is a transcript thereof, verified by the President and Secretary of such Special Meeting, to-wit:

“Minutes of the Special Meeting of stockholders of Guaranty Trust Company of New York, held at the office of the Company in the Mutual Life Building, at the corner of Nassau and Cedar streets, in the Borough of Manhattan, New York City, the usual place of meeting of the Directors, on Wednesday, the 14th day of December, 1904, at 11 o'clock a. m.”

At the time and place above specified there appeared in person and by proxy, stockholders owning a majority of the stock of the corporation, to-wit: 16,770 shares out of the total issue of 20,000 shares, and organized by choosing from their number John W. Castles as President, and Edgar C. Hebbard as Secretary of such Special Meeting.

On motion duly made and carried, the reading of the minutes of the last meeting was dispensed with.

There was produced from on file in the office of the corporation and read at the meeting, due proof of service of two weeks' notice in writing upon each stockholder of record, by duly mailing on the 30th day of November, 1904, such notice of special meeting directed to each stockholder of record at his last known postoffice address, said notice being as follows:

GUARANTY TRUST COMPANY OF NEW YORK  
Mutual Life Building, Corner Nassau and Cedar Streets  
London Office, 33 Lombard Street.

New York, November 30, 1904.

*To the Stockholders of the Guaranty Trust Company of  
New York:*

A Special Meeting of the Stockholders of Guaranty Trust Company of New York will be held at the office of this Company, in the Mutual Life Building, at the corner of Nassau and Cedar Streets, in the Borough of Manhattan, New York City, the usual place of meeting of the Directors, on Wednesday, the 14th day of December, 1904, at eleven o'clock a. m., to determine whether the number of Directors of the said Trust Company shall be increased from twenty-one, the present number, to twenty-seven.

E. C. HEBBARD,  
Secretary.

There was also produced from on file in the office of said corporation, and read at said meeting, the Consent in writing of the Superintendent of Banks, given under his official seal, to the increase of the number of Directors of this Trust Company from twenty-one, the present number, to twenty-seven, upon compliance with the provisions of Section 21 of the Stock Corporation Law.

William P. Dixon, Norman Henderson, and James Simpson were duly nominated to be inspectors of election to act at the Special Meeting and upon a vote being had were duly elected such inspectors of election, and before entering upon the discharge of their duties were severally sworn to faithfully execute the duties of inspectors at such meeting with strict impartiality and according to the best of their ability, and the oath so taken was duly reduced to writing and severally subscribed by them.

Upon motion duly made a vote was then taken of

the stockholders present in person and by proxy on the following resolution:

RESOLVED, That the number of Directors of the Guaranty Trust Company of New York, be, and the same is, increased from twenty-one, the present number, to twenty-seven, and that the Board of Directors and Officers of the Company take all necessary steps to carry into effect this resolution.

Stockholders owning 16,770 shares of stock, being a majority of the stock of the corporation, voted in favor of such resolution and no stockholder voted against its adoption.

The said Inspectors of Election then certified that a sufficient number of votes had been given in favor of the adoption of said resolution and accordingly as the result of such vote the President of the meeting declared the same adopted.

The said Inspectors of Election thereupon made and executed their certificate in writing of the result of said vote taken at this Special Meeting to increase the number of directors from twenty-one, the present number, to twenty-seven, and the said certificate together with the oath so taken and subscribed by them as aforesaid, was directed to be filed immediately in the office of the Clerk of New York County, that being the county in which this Special Meeting had been held.

There being no further business the meeting, on motion duly made and carried, was adjourned.

IN WITNESS WHEREOF, we have made, signed, and verified this certificate, this 2nd day of August, 1907.

JOHN W. CASTLES,  
President.

E. C. HEBBARD,  
Secretary.

STATE OF NEW YORK, }  
 COUNTY OF NEW YORK, }ss.

John W. Castles, President, and Edgar C. Hebbard, Secretary, respectively, of a special meeting of stockholders of Guaranty Trust Company of New York, held at the office of this company in the Mutual Life Building, corner of Nassau and Cedar Streets, Borough of Manhattan, New York City, the usual place of meeting of the Directors, on Wednesday, the 14th day of December, 1904, being severally duly sworn, depose and say and each for himself deposes and saith: that he has read the foregoing certificate subscribed by him and knows its contents, and that the same is true and that the transcript of the proceedings of such special meeting is a true transcript thereof as entered on the minutes of the corporation.

JOHN W. CASTLES,

E. C. HEBBARD.

Sworn to before me this 2nd day of August, 1907.

(Seal) GEORGE P. FORT,

Notary Public, Kings County.

Certificate filed in New York County.

Commission expires March 30, 1908.

### Reduction in Number of Directors

STATE OF NEW YORK, BANKING DEPARTMENT

In the matter of the proposed  
 reduction in the number of di-  
 rectors of the GUARANTY  
 TRUST COMPANY OF NEW  
 YORK.

I, CHARLES H. KEEP, Superintendent of Banks of the State of New York, DO HEREBY CONSENT that the

number of directors of the GUARANTY TRUST COMPANY OF NEW YORK be reduced from twenty-seven (27), the present number, to twenty-one (21), upon compliance with the provisions of Section 21 of the Stock Corporation Law.

WITNESS, my hand and official seal at the City of Albany, this seventh day of June in the year of our Lord one thousand nine hundred and seven.

C. H. KEEP,

(Seal)

Superintendent of Banks.

We, the undersigned, John W. Castles, President, and E. C. Hebbard, Secretary, respectively, of a Special Meeting of the stockholders of Guaranty Trust Company of New York, duly called and held at the office of the Company, No. 28 Nassau Street, New York City, the usual place of meeting of the Directors, DO HEREBY CERTIFY that the proceedings of such meeting have been entered in the minutes of the corporation, and that the following is a transcript thereof, to-wit:

MINUTES OF A SPECIAL MEETING OF THE STOCKHOLDERS OF GUARANTY TRUST COMPANY OF NEW YORK, HELD AT THE OFFICE OF THE COMPANY, NO. 28 NASSAU STREET, NEW YORK CITY, BEING THE USUAL PLACE OF MEETING OF THE DIRECTORS, ON THURSDAY, JUNE 27, 1907, AT 11 A. M.

At the time and place specified there appeared in person or by proxy, stockholders owning a majority of the stock of the Company, to-wit: 15,656 shares out of a total issue of 20,000 shares.

The meeting was organized by the election from the stockholders of John W. Castles as President of the meeting and E. C. Hebbard as Secretary of the meeting.

The notice of the meeting, together with an affidavit

of due service thereof on each stockholder of record, two weeks before the meeting, to-wit, on the 12th day of June, 1907, by mail, directed to each stockholder at his last known postoffice address, was produced from on file in the office of the corporation and read. Said notice and affidavit were ordered spread upon the minutes of the meeting and are as follows:

STATE OF NEW YORK,        }  
 COUNTY OF NEW YORK, }ss.

WILLIAM E. HAMMELL, being duly sworn deposes and says: That he is over twenty-one years of age and is in the employ of Guaranty Trust Company of New York. That on the 12th day of June, 1907, he mailed the notice of which a copy is hereto annexed to each stockholder of record of Guaranty Trust Company of New York by depositing a copy of said notice in the post-office in the Borough of Manhattan, City of New York and enclosed in a postpaid sealed envelope directed to each said stockholder at his last known post-office address.

Deponent personally examined on said 12th day of June, 1907, the stock book of said Guaranty Trust Company of New York and knows that the several persons to whom he mailed such notices were on said day the owners of record of all of the capital stock of said Guaranty Trust Company of New York.

WILLIAM E. HAMMLEE.

Sworn to before me this 17th day of June, 1907.

(Seal) JAMES D. HURD,

Notary Public No. 103, Kings County.

Certificate filed in New York County.

Commission expires March 30, 1908.

GUARANTY TRUST COMPANY OF NEW YORK,  
 28 Nassau Street,



London Office, 33 Lombard Street, E. C.

New York, June 12, 1907.

*To the Stockholders of the Guaranty Trust Company  
of New York:*

A Special Meeting of the Stockholders of the GUARANTY TRUST COMPANY OF NEW YORK will be held at the office of the Company, 28 Nassau Street, in the Borough of Manhattan, New York City, the usual place of meeting of the Directors, on Thursday, the 27th day of June, 1907, at 11 o'clock a. m., to determine whether the number of Directors of the said Trust Company shall be decreased from twenty-seven (27) to twenty-one (21).

E. C. HEBBARD,  
Secretary.

The consent of the Superintendent of Banks to the decrease of the number of directors of the Company from twenty-seven (27) to twenty-one (21) was produced and read.

On motion duly seconded, Wm. P. Dixon, Norman Henderson and James Timpson were thereupon elected Inspector to act at this meeting, and were severally sworn to faithfully execute the duties of Inspectors with strict impartiality and according to the best of their ability, and the oath so taken was subscribed by them.

On motion duly seconded, a vote was taken upon the following resolutions:

RESOLVED, That the number of Directors of the Guaranty Trust Company of New York be and the same hereby is decreased from twenty-seven (27) to twenty-one (21), and that the Board of Directors and Officers of the Company take all necessary steps to carry into effect this resolution.

Thereupon stockholders owing 15,656 shares of stock, being a majority of stock of the company, voted in favor of such resolution and no stockholder voted against its adoption. The said Inspectors of Election declared the result of said vote accordingly, and said resolution was declared duly adopted.

The said Inspectors of Election thereupon made and executed a certificate in writing as the result of said vote taken at this meeting, and said certificate together with the oath taken and executed by them as aforesaid, was directed to be filed immediately in the office of the Clerk of the County of New York, in which County this meeting was held, and upon motion duly made and seconded, the meeting adjourned.

JOHN W. CASTLES,  
President.

E. C. HEBBARD,  
Secretary.

IN WITNESS WHEREOF, we have made, signed, verified and filed this certificate, this 27th day of June, 1907.

JOHN W. CASTLES,  
President.

E. C. HEBBARD,  
Secretary.

STATE OF NEW YORK, }  
COUNTY OF NEW YORK, } ss.

John W. Castles and E. C. Hebbard being severally duly sworn, depose and say: That he, the said John W. Castles was the President, and he, the said E. C. Hebbard, was the Secretary of a Special Meeting of the stockholders of the Guaranty Trust Company of New York, held at the office of the Company, No. 28 Nassau Street, in the city of New York, the usual place of meet-

ing of the Directors, on Thursday, June 27th, at 11:00 a. m.

That the proceedings of such meeting have been entered in the minutes of the corporation, and that the foregoing transcript thereof is true.

JOHN W. CASTLES,

E. C. HEBBARD,

Sworn to before me this 27th day of June, 1907.

(Seal) JAMES D. HURD,

Notary Public No. 103, Kings County.

Certificate filed in New York County.

Commission expires March 30, 1908.

### Certificate of Increase of Capital Stock of \$20,000,000

GUARANTY TRUST COMPANY OF NEW YORK.

The undersigned, CHARLES H. SABIN, Chairman, and E. C. HEBBARD, Secretary, respectively, of a special meeting of the stockholders of Guaranty Trust Company of New York, a domestic stock corporation, held for the purpose of voting upon a proposed increase of its capital stock, do hereby certify as follows:

Prior to such meeting a notice, stating the time, place and object thereof, and the amount of the increase proposed, signed by the President and the Secretary, was published once a week for at least two successive weeks in *The New York Times* and *The Evening Post*, each being a newspaper published in the County of New York, the county where the principal business office of such corporation is located.

The following is a true copy of such notice:

GUARANTY TRUST COMPANY OF NEW YORK,

140 Broadway.

New York, November 8, 1915.

*To the Stockholders of Guaranty Trust Company of  
New York:*

A special meeting of the stockholders of Guaranty Trust Company of New York has been called and will be held at the office of the corporation, No. 140 Broadway, Borough of Manhattan, City of New York, on Wednesday, November 24, 1915, at twelve o'clock noon. The object of the meeting is to vote upon the proposed increase of the capital stock of the Guaranty Trust Company of New York by \$10,000,000, namely: from \$10,000,000 to \$20,000,000, and to determine the disposition of such increase.

By order of the Board of Directors.

CHARLES H. SABIN,  
President.

E. C. HEBBARD,  
Secretary.

A copy of such notice was also duly mailed, postage prepaid, to each stockholder of such corporation, at his last known post-office address, at least two weeks before the meeting.

At the time and place specified in such notice, stockholders appeared, in person or by proxy, in numbers representing at least a majority of all the shares of stock of such corporation and organized by choosing from their number the undersigned, Charles H. Sabin, as Chairman and E. C. Hebbard as Secretary thereof.

The notice of the meeting and proof of the proper publishing and mailing thereof were presented.

Upon motion, a vote was then taken of those present in person or by proxy upon the following resolutions:

RESOLVED, That the capital stock of Guaranty Trust Company of New York be increased from the present

amount thereof, to-wit, \$10,000,000, consisting of 100,000 shares, each of the par value of \$100, all thereof having been heretofore authorized and actually issued, to the amount of \$20,000,000, to consist of 200,000 shares, each of the par value of \$100.

RESOLVED, That the Chairman and the Secretary of this meeting be and hereby are authorized and directed to make, sign, verify and acknowledge a certificate in triplicate of the proceedings of this meeting, as required by Statute, and to submit the same to the Superintendent of Banks for his endorsement thereon of his approval of such increase of capital stock, and thereupon to cause such certificate to be filed in the office of the Clerk of the County of New York, a duplicate thereof in the office of the Secretary of State, and a triplicate thereof in the office of the Superintendent of Banks, and to cause the proceedings of this meeting to be entered in the minutes of the corporation, and to do all other acts and things which may be necessary to comply with the provisions of law applicable to and regulating such increase of capital stock.

Stockholders owning 87,002 shares of stock, being at least a majority of all the stock of the corporation, voted in favor of such resolutions; and stockholders owning no shares voted against their adoption.

A sufficient number of votes having been cast in favor of such increase, such resolutions were declared duly adopted.

The amount of the capital stock of the corporation heretofore authorized is \$10,000,000, and the whole thereof is actually issued; and the amount of the capital stock as increased is \$20,000,000.

The assets of the corporation are at least equal to

its debts and liabilities and the capital stock as increased.

IN WITNESS WHEREOF, We have made, signed, verified and acknowledged this certificate in triplicate.

Dated this 24th day of November, 1915.

CHARLES H. SABIN,  
Chairman.

E. C. HEBBARD,  
Secretary.

STATE OF NEW YORK,  
COUNTY OF NEW YORK,  
SS.

Charles H. Sabin, Chairman and E. C. Hebbard, Secretary, respectively of the aforesaid meeting, being severally duly sworn, do depose and say, and each for himself does depose and say, that he has read the foregoing certificate, subscribed by him, and knows its contents, and that the same is true.

CHARLES H. SABIN,  
Chairman.

E. C. HEBBARD,  
Secretary.

Sworn to before me this 24th day of November, 1915.

WM. H. BNIDER,  
Notary Public, Bronx County No. 35.  
Certificate filed in New York County No. 45.

STATE OF NEW YORK,  
COUNTY OF NEW YORK,  
SS.

On this 24th day of November, 1915, before me personally came Charles H. Sabin and E. C. Hebbard, each to me known and known to me to be the persons described in and who executed the foregoing certificate,



and they severally duly acknowledged to me that they executed the same.

WM. H. BNIDER,

Notary Public, Bronx County No. 35.

Certificate filed in New York County No. 45.

Notary Public, New York City.

(Endorsement.)

STATE OF NEW YORK, BANKING DEPARTMENT.

I hereby approve the increase of the capital stock of Guaranty Trust Company of New York from \$10,000,000, consisting of 100,000 shares, each of the par value of \$100 to \$20,000,000, to consist of 200,000 shares, each of the par value of \$100, as set forth in the within certificate.

WITNESS my hand and official seal at the City of New York this 24th day of November, 1915.

EUGÈNE LAMB RICHARDS,

(Seal)

Superintendent of Banks of the State of New York.

### Trust Company Charters

#### ARTICLES OF ASSOCIATION OF THE MISSISSIPPI VALLEY TRUST COMPANY.

BE IT REMEMBERED, That the undersigned have associated, and do hereby associate themselves, by the following articles of agreement, under and in virtue of Article XI of Chapter 42 of the Revised Statutes of the State of Missouri, 1889, concerning "Trust Companies," for the purpose of forming a corporation such as in and by the provisions of said Article XI authorized; that is to say, upon the terms and in the manner following, to-wit:

I. The corporate name of the proposed corporation shall be Mississippi Valley Trust Company.

II. The said corporation shall be located in the city of St. Louis, State of Missouri.

III. The amount of the authorized capital stock of the said corporation shall be (\$2,000,000) Two Million Dollars, to be divided into (20,000) Twenty Thousand shares of the par value of (\$100) One Hundred Dollars per share, and it is hereby certified that the amount of the capital stock of said corporation actually subscribed in good faith at the time of the filing of these articles is (5,000) Five Thousand shares thereof, at the par value aforesaid for each of said shares; and it is further certified that one-half of the capital stock so subscribed has been actually paid up in lawful money of the United States and is in the custody of the persons hereinafter named as the first board of directors of said corporation.

IV. The names and places of residence of the several shareholders and the number of shares of stock in said corporation subscribed by each are as follows:

<i>Names.</i>	<i>Residences.</i>	<i>Shares Subscribed.</i>
L. C. Nelson . . . .	St. Louis.	Two hundred
Charles Clark . . . .	St. Louis.	Five hundred
F. W. Paramore . . . .	St. Louis.	Ten shares
Geo. H. Goddard . . . .	St. Louis.	Two hundred and fifty
S. E. Hoffman . . . .	St. Louis.	Five hundred
Julius S. Walsh . . . .	St. Louis.	Five hundred
S. W. Cobb . . . . .	St. Louis.	One hundred
Williamson Bacon . . . .	St. Louis.	Five hundred
Chas. H. Bailey . . . .	St. Louis.	Two hundred and fifty
L. G. McNair . . . . .	St. Louis.	One hundred and fifteen
David W. Caruth . . . .	St. Louis.	Two hundred and fifty
Joel Wood . . . . .	St. Louis.	One hundred
James Campbell . . . .	St. Louis.	Two hundred and fifty
Thos. T. Turner . . . .	St. Louis.	Two hundred
John Scullin . . . . .	St. Louis.	One hundred
A. B. Pendleton . . . .	St. Louis.	One hundred

T. O'Reilly, M. D. St. Louis. . . Two hundred and fifty  
 B. F. Hammett. . . St. Louis. . . One hundred twenty-five  
 Aug. B. Ewing. . . St. Louis. . . Two hundred  
 John D. Perry. . . St. Louis. . . Two hundred and fifty  
 S. R. Francis. . . St. Louis. . . Two hundred and fifty

V. The number of the Board of Directors of said corporation shall be (21) Twenty-one, and the following persons, subscribers to said stock, have been agreed upon as constituting said Board of Directors for the first year, to-wit: Charles Clark, F. W. Paramore, George H. Goddard, Julius S. Walsh, S. E. Hoffman, S. W. Cobb, Williamson Bacon, L. C. Nelson, Chas. H. Bailey, L. G. McNair, David W. Caruth, Joel Wood, James Campbell, Thos. T. Turner, John Scullin, A. B. Pendleton, Thomas O'Reilly, B. F. Hammett, Aug. B. Ewing, John D. Perry, and S. R. Francis.

VI. The said corporation shall continue for fifty years from the date hereof.

VII. The purposes for which the said corporation is formed, as authorized by said Article XI of said Chapter 42, of said Revised Statutes of Missouri, are the following:

*First.* To receive moneys in trust, and to accumulate the same at such rates of interest as may be obtained or agreed upon, or to allow such interest thereon as may be agreed not exceeding in either case the legal rate.

*Second.* To accept and execute all such trusts and perform such duties of every description as may be committed to them by any person or persons whatsoever, or any corporations, or may be committed or transferred to them by order of any of the courts of record of this state, or other state, or of the United States.

*Third.* To take and accept by grant, assignment, transfer, devise or bequest, and hold any real or personal

estate or trusts created in accordance with the laws of this state, or other states, or of the United States, and execute such legal trusts in regard to the same, on such terms as may be declared, established, or agreed upon in regard thereto, or to execute or guarantee any bond or bonds required by law to be given in any proceeding in law or equity in any of the courts of this state, or other state, or of the United States.

*Fourth.* To act as agent for the investment of money for other persons, and as agent for persons and corporations for the purpose of issuing, registering, transferring or countersigning the certificates of stock bonds or other evidence of debt of any corporation association municipality, state or public authority, on such terms as may be agreed upon.

*Fifth.* To accept from, and execute trusts for, married women, in respect to their separate property, whether real or personal, and act as agents for them in the management of such property, and generally to have and exercise such powers as are usually had and exercised by trust companies.

*Sixth.* To act as guardian or curator of any infant or insane person, under the appointment of any court of record having jurisdiction of the person or estate of such infant or insane person.

*Seventh.* To guarantee the fidelity and diligent performance of their duty of persons holding places of public or private trust, and to certify and guarantee title to real estate.

*Eighth.* To loan money upon real estate and collateral security, and execute and issue its notes and debentures, payable at a future date, and to pledge its mortgages on real estate and other securities as security therefor.

*Ninth.* To buy and sell all kinds of government, state, municipal and other bonds, and all kinds of negotiable and non-negotiable paper, stocks and other investment securities.

IN WITNESS WHEREOF, the undersigned, subscribers to said capital stock, on behalf of themselves, and their associates, also subscribers to the same, and their successors have signed and acknowledged these articles of agreement at the said City of St. Louis, Missouri, this twenty-ninth day of September in the year of our Lord, One Thousand Eight Hundred and Ninety:

Joel Wood,  
James Campbell,  
Thomas T. Turner,  
John Scullin,  
A. B. Pendleton,  
Thomas O'Reilly, M. D.  
B. F. Hammett,  
Aug. B. Ewing,  
John D. Perry,  
S. R. Francis,  
David W. Caruth.

Charles Clark,  
F. W. Paramore,  
George H. Goddard,  
Julius S. Walsh,  
S. E. Hoffman,  
S. W. Cobb,  
Williamson Bacon,  
L. C. Nelson,  
Chas. H. Bailey,  
L. G. McNair,

STATE OF MISSOURI,  
CITY OF ST. LOUIS,  
SS.

BE IT REMEMBERED, That on the 20th day of September, A. D., 1890, before the undersigned, notary public within and for the aforesaid city and state, duly commissioned and qualified for a term expiring on the 12th day of May, 1894, in said city of St. Louis, personally appeared Charles Clark, to me known to be one of the persons described in, and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

And I further certify that on the 24th day of September, A. D. 1890, at said City of St. Louis, before me as said Notary Public, personally appeared Julius S. Walsh, S. E. Hoffman, S. W. Cobb, Williamson Bacon, L. C. Nelson, C. H. Bailey, L. G. McNair, David W. Caruth, Joel Wood, also to me known to be the persons who by same names last mentioned are described in and who executed the foregoing instrument, and severally acknowledged that they executed same as their free act and deed.

And I further certify that on the 25th day of September, A. D. 1890, at said city of St. Louis, before me as said Notary Public, personally appeared James Campbell, Thomas T. Turner, John Scullin and A. B. Pendelton, also to me known to be the persons who by same names last mentioned are described in, and who executed the foregoing instrument, and severally acknowledged, that they executed the same as their free act and deed.

And I further certify that on the 26th day of September, A. D. 1890, at said City of St. Louis, before me as said Notary Public, personally appeared Thos. O'Reilly, M. D., also to me known to be the person who by same name last mentioned is described in, and who executed the foregoing instrument and acknowledged that he executed same as his free act and deed.

And I further certify that on the 27th day of September, A. D. 1890, at said City of St. Louis, before me as said Notary Public, personally appeared B. F. Hammett, and Aug. B. Ewing, also to me known to be the persons who by same names last mentioned, are described in, and who executed the foregoing instrument, and severally acknowledged that they executed the same as their free act and deed.



And I further certify that on the 29th day of September, A. D. 1890, at said City of St. Louis, before me as said Notary Public, personally appeared S. R. Francis and John D. Perry, also to me known to be the persons who by same names last mentioned are described in, and who executed the foregoing instrument, and severally acknowledged that they executed same as their free act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal, as such Notary Public at my office in the City of St. Louis, and State of Missouri, this 29th day of September, A. D. 1890.

(Copy of Seal)

CHARLES C. DOW,

Notary Public, City of St. Louis, Mo.

CHARLES C. DOW,

Notary Public within and for the City of St. Louis  
and State of Missouri.

STATE OF MISSOURI,

CITY OF ST. LOUIS,

SS.

BE IT REMEMBERED, That on this 20th day of September, 1890, before undersigned, a Notary Public within and for the aforesaid city and state, duly commissioned and qualified for a term expiring on the 26th day of June, 1893, in said City of St. Louis, personally appeared F. W. Paramore, and George H. Goddard to me known to be the persons described in, and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

IN TESTIMONY WHEREOF, I have hereto set my hand and affixed my notarial seal this 29th day of September, 1890.

HARVEY L. CHRISTIE,

Notary Public, City of St. Louis.  
 Commission expires June 26, 1893.

(Copy of Seal)

HARVEY L. CHRISTIE,  
 Notary Public, City of St. Louis, Missouri.  
 Filed and recorded October 1, 1890, at 1:20 p. m.  
 WM. A. HOBBS,  
 Recorder.

STATE OF MISSOURI,  
 CITY OF ST. LOUIS,  
 SS.

I, the undersigned, Recorder of Deeds for said city and state, do hereby certify the foregoing to be a true copy of the articles of incorporation of the MISSISSIPPI VALLEY TRUST COMPANY, together with the acknowledgment, and date of filing and recording thereof, as the same remains of record in my office in Book Corps. 9, page 89.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this first day of October, A. D. 1890.

WM. A. HOBBS,  
 Recorder.

(Seal)

Filed and certificate of Incorporation issued October 3, 1890.

A. A. LESUEUR,  
 Secretary of State.

### Certificate of Incorporation of a New Jersey Trust Company

THIS IS TO CERTIFY, That we, the undersigned, do hereby associate ourselves into a trust company, under and by virtue of the provisions of an act of the legislature

of the State of New Jersey, entitled, "An Act Concerning Trust Companies (Revision of 1899)," approved March 24, 1899, and we do hereby severally subscribe for and agree to take and pay for the number of shares of the capital stock of such trust company set opposite our respective names in article "Fifth" of this certificate; and we do further certify:

*First.* The name of the trust company hereby formed is

COMMERCIAL TRUST COMPANY OF NEW JERSEY.

*Second.* The place where its business is to be carried on is the city of Jersey City, in the County of Hudson, in this State, and the location of the office of said Company in this State is No. 55 Montgomery Street, in the city of Jersey City aforesaid, and the name of the agent therein and in charge thereof, upon whom process against said corporation may be served, is James C. Young.

*Third.* The purposes and objects of said corporation are to carry on and conduct the business of a Trust Company, having and exercising all the rights, privileges and powers granted to trust companies by said act of the Legislature of the State of New Jersey, together with all rights, privileges and powers that are now or may hereafter be granted to or exercisable by trust companies by or under the laws of this state; and

(1) To act as the fiscal or transfer agent of any state, municipality, body politic or corporation and in such capacity to receive and disburse money;

(2) To transfer, register and countersign certificates of stock, bonds or other evidences of indebtedness, and to act as agent of any corporation, foreign or domestic, for any purpose now or hereafter required by statute or otherwise;

(3) To receive deposits of trust moneys, securities and other personal property from any person or corporation, and to loan money on real or personal securities;

(4) To lease, hold, purchase, and convey any and all real property necessary for or convenient in the transaction of its business, or which the purposes of the corporation may require, or which it shall acquire in satisfaction or partial satisfaction of debts due the corporation under sales, judgments or mortgages, or in settlement or partial settlement of debts due the corporation by any of its debtors;

(5) To act as trustee under any mortgage or bond issued by any municipality, body politic or corporation, and to accept and execute any other municipal or corporate trust not inconsistent with the laws of this State;

(6) To accept trusts from and execute trusts for married women, in respect to their separate property, and to be their agent in the management of such property, or to transact any business in relation thereto;

(7) To act, under the order or appointment of any Court of Record, as guardian, receiver or trustee of the estate of any minor, and as depository of any moneys paid into court, whether for the benefit of any such minor or other person, corporation or party;

(8) To take, accept and execute any and all such legal trusts, duties and powers in regard to the holding, management and disposition of any estate, real or personal, and the rents and profits thereof, or the sale thereof, as may be granted or confided to it by any Court of Record, or by any person, corporation, municipal or other authority;

(9) To take, accept and execute any and all such trusts and powers of whatever nature or description as

may be conferred upon or intrusted or committed to it by any person or persons, or any body politic, corporation or other authority, by grant, assignment, transfer, devise, bequest or otherwise, or which may be intrusted or committed or transferred to it or vested in it by order of any Court of Record, or any surrogate, and to receive and take and hold any property or estate, real or personal, which may be the subject of any such trust;

(10) To purchase, invest in and sell stocks, promissory notes, bills of exchange, bonds and mortgages and other securities; and when moneys or securities for moneys are borrowed or received on deposit, or for investment, the bonds or obligations of the company may be given therefor;

(11) To be appointed and to accept the appointment of assignee or trustee, under any assignment for the benefit of creditors of any debtor, made pursuant to any statute or otherwise;

(12) To act under the order or appointment of the Court of Chancery or otherwise as receiver or trustee of the estate of property of any person, firm, association or corporation;

(13) To be appointed and to accept the appointment of executor of or trustee under any last will and testament, or administrator, with or without the will annexed, of the estate of any deceased person, and to be appointed and to act as the committee of the estates of lunatics, idiots, persons of unsound mind and habitual drunkards.

(14) To exercise the powers conferred on and to carry on the business of a safe deposit company; to examine and guarantee title to land; to insure the fidelity of persons holding offices or places of trust or responsi-

bility and to become sole surety in any case where by law two or more sureties are required:

(15) To collect coupons on, or interest upon all manner of securities when authorized so to do by the parties depositing the same;

(16) To receive and manage any sinking fund of any corporation, upon such terms as may be agreed upon between said corporation and those dealing with it;

(17) Generally to execute trusts of every description not inconsistent with the laws of this State or of the United States;

(18) To receive money on deposit to be subject to check or to be repaid in such manner and on such terms, and with or without interest as may be agreed upon by the depositor and the said trust company.

*Fourth.* The amount of capital stock of said corporation is Five Hundred Thousand Dollars, divided into Five Thousand shares of the par value of one hundred dollars each.

*Fifth.* The names and residences of the incorporators, and the number of shares subscribed by each of them, are as follows:

*Sixth.* The period of the duration of this company shall be unlimited.

IN WITNESS WHEREOF, We have hereunto set our hands and seals this first day of July, A. D. eighteen hundred and ninety-nine.

Signed, sealed and delivered in the presence of

STATE OF NEW YORK,  
COUNTY OF NEW YORK,  
SS.

BE IT REMEMBERED, That on this twentieth day of July, A. D. eighteen hundred and ninety-nine, personally



appeared, before me, a Master in Chancery of the State of New Jersey, Luther Kountze, J. D. Carscallen, who I am satisfied are two of the persons named in and who executed the foregoing certificate, and I, having first made known to them the contents thereof, they did severally acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

EDMUND W. WAKELEE,  
Master in Chancery, New Jersey.

STATE OF NEW JERSEY,  
COUNTY OF ESSEX,

SS.

BE IT REMEMBERED, That on this 23rd day of August, A. D. eighteen hundred and ninety-nine, personally appeared, before me, a Notary Public and Commissioner of Deeds, J. William Clark, who I am satisfied is one of the persons named in and who executed the foregoing certificate, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

(Official Seal and other acknowledgments)

W. A. CLARK,  
Notary Public and Commissioner of Deeds.

\* \* \*

STATE OF NEW JERSEY, DEPARTMENT OF BANKING AND  
INSURANCE.

Trenton, December 5, 1899.

I hereby approve the form of the foregoing Certificate of Incorporation of the Commercial Trust Company of New Jersey, and it appearing to me that the establishment of such Trust Company will be of public serv-

ice, I hereby annex thereto my approval thereof, pursuant to Section 3 of "An Act Concerning Trust Companies" (Revision of 1899), approved March 24, 1899.

WILLIAM BETTLE,  
Commissioner of Banking and Insurance.

\* \* \*

Endorsed:—

Filed December 8, 1899.

WILLIAM BETTLE,  
Commissioner of Banking and Insurance.

Received in the Hudson County, N. J., Clerk's Office, December 6, A. D. 1899, and Recorded in Clerk's Record No. . . on Page . . .

JOHN G. FISHER,  
Clerk.

### Certificate of Incorporation of a Pennsylvania Trust Company

*To the Governor of the Commonwealth of Pennsylvania:*

SIR: In compliance with the requirements of an Act of the General Assembly of the Commonwealth of Pennsylvania, entitled "An act to provide for the incorporation and regulation of certain corporations," approved the 29th day of April, A. D. 1874, and the several supplements thereto, the undersigned, three or more, of whom are citizens of Pennsylvania, having associated themselves together for the purpose hereinafter specified, and desiring that they may be incorporated, and that letters patent may issue to them and their successors according to law, do hereby certify:

1st. The name of the proposed corporation is the COMMERCIAL TRUST COMPANY.

2nd. Said corporation is formed for the purpose of the insurance of owners of real estate, mortgages and

others interested in real estate from loss by reason of defective titles, liens and encumbrances and for conducting and carrying on all and every kind of business authorized by said Act of Assembly, approved the 29th day of April, A. D. 1874, and the various supplements thereto.

3d. The business of said corporation is to be transacted in Philadelphia, Pennsylvania.

4th. Said corporation is to exist perpetually.

5th. The names and residences of the subscribers and the number of shares subscribed by each, are as follows:

6th. The number of directors of said corporation is fixed at six, and the names and residences of the directors who are chosen directors for the first year are as follows:

Louis Fitzgerald, 253 Lexington avenue, New York.

A. J. Cassatt, Haverford, Pa.

Frank Thomson, Merion, Pa.

Thomas DeWitt Cuyler, Haverford, Pa.

Theodore Frothingham, 2035 Locust street, Philadelphia, Pa.

Clement A. Griscom, Haverford, Pa.

7th. The amount of the capital stock of said corporation is \$500,000, divided into 5,000 shares of the par value of \$100, and \$50,000 being ten per centum of the capital stock, has been paid in cash to the Treasurer of said corporation, whose name and residence are:

B. Gordon Bromley, 3930 Walnut street, Philadelphia, Pa.

THOMAS DEWITT CUYLER. (Seal)

FRANK THOMSON. (Seal)

C. A. GRISCOM. (Seal)

THEODORE FROTHINGHAM. (Seal)

B. GORDON BROMLEY. (Seal)

STATE OF PENNSYLVANIA,  
 COUNTY OF PHILADELPHIA,  
 SS.

Before me, the Recorder of Deeds, in and for the county aforesaid, personally came the above named, B. Gordon Bromley, Theodore Frothingham and Thomas DeWitt Cuyler, who in due form of law acknowledged the foregoing instrument to be their act and deed for the purpose therein specified.

Witness my hand and Seal of office, the twenty-seventh day of September, A. D. 1894.

(Seal)

JOS. K. KLETCHER,  
 Acting Recorder.

STATE OF PENNSYLVANIA,  
 COUNTY OF PHILADELPHIA,  
 SS.

Personally appeared before me, this 27th day of September, A. D. 1894, B. Gordon Bromley, Theodore Frothingham, and Thomas DeWitt Cuyler, who being duly sworn, according to law, depose and say that the statements contained in the foregoing instrument are true.

Sworn and subscribed before me, the day and year aforesaid.

JOS. K. FLETCHER,  
 Acting Recorder.

THOMAS DEWITT CUYLER,  
 THEODORE FROTHINGHAM,  
 B. GORDON BROMLEY.

(Endorsement in Back of Certificate.)

## EXECUTIVE CHAMBER.

Harrisburg, October 24, 1894.

*To the Secretary of the Commonwealth:*

Having examined the within application and found it to be in proper form, and within the purposes of the class of corporations specified in Section 2 of Act, entitled "An act to provide for the incorporation and regulation of certain corporations," approved April 29th, A. D. 1874, and the several supplements thereto, I hereby approve the same, and direct that letters patent issue according to law.

ROBERT E. PATTERSON,  
Governor.

\* \* \*

## SECRETARY'S OFFICE.

PENNSYLVANIA, SS:

Enrolled in Charter Book No. 44, Page 30.

Witness my hand and Seal of office, at Harrisburg,  
this 24th day of October, A. D. 1894.

A. L. TILDEN,  
Deputy. Secretary of the Commonwealth.

**Charter of the Imperial Trust Company of Montreal,  
Canada**

(5th Edward VII, Chapter 79.)

WHEREAS, William Cassils McIntyre, merchant; Edmund Arthur Robert, manufacturer; James Ross, accountant; Frank Howard Wilson, merchant; George Ross Robertson, insurance broker, all of the city of Montreal, have presented a petition praying for the passing of an act to incorporate a company under the name and style of "The Imperial Trust Company" for the purpose of doing a general trust and agency business and as a safe deposit company and general financial

agent; and whereas it is expedient to grant such petition;

Therefore, His Majesty, with the advice and consent of the Legislative Council and of the Legislative Assembly of Quebec, enacts as follows:

I. The said William Cassils McIntyre, Edmund Arthur Robert, James George Ross, Frank Howard Wilson, and George Ross Robertson, together with such persons as may become shareholders of the company, are hereby incorporated and constituted a body corporate under the name of "The Imperial Trust Company."

II. The head office of the company shall be in the city of Montreal, and the company may establish branches in other places.

III. The company is hereby authorized and empowered:

1. To accept, fulfil and execute all such trusts as may be committed to the company by any person or persons, or by any corporation, or by any court of law, on such terms as may be agreed upon, or as the court shall in case of disability approve, and which are not contrary to the provisions of the Civil Code, and to take, receive, hold and convey all estates and property, both real and personal which may be granted, committed or conveyed to the company with its assent upon any such trust or trusts;

2. Generally, to act as agent or attorney for the transaction of business, the management of estates, the investments and collection of moneys, rents, interests, dividends, mortgages, bonds, bills, notes and other securities; to act as agent for the purpose of registering, issuing and countersigning the transfers and certificates of stocks, debentures or other obligations of the Dominion of Canada, or of any province thereof, or any corpora-



tion, association, municipality or person, and to receive and manage any sinking fund therefor, on such terms as may be agreed upon;

3. To construct, maintain and operate or lease suitable buildings and structures for the reception and storage of all moveable and personal property of every nature and kind; to act as agent, consignee and bailee thereof, and to take all kinds of personal property for deposit and safe keeping, on such terms as may be agreed upon, and to make loans on the same;

4. To lend money upon such terms as are deemed expedient, with power to take security for the same or any other indebtedness owing to the company, upon real estate, ground rents, Dominion, provincial, British, foreign, or other public securities, or upon the stocks, shares, bonds, debentures or other securities of any municipal or other corporation, or upon goods warehoused or pledged with the company, or upon such other securities or guarantees as are deemed expedient, and to acquire, by purchase or otherwise, any of the aforesaid property or assets, which may have been pledged with the company, as security for such loan or indebtedness, and to resell the same;

5. To act as an agency or association for or on behalf of others who entrust it with money for loan or investment; also to secure the repayment of the principal, or the payment of the interest, or both, of any moneys entrusted with the company for investment; and, for the purpose of securing the company against loss upon any guarantee or obligation, or any advance made by the company, to receive and dispose of any description of asset or security, which is conveyed, pledged, mortgaged or assigned to, or warehoused with the company,

in connection with such guarantee, obligation, advance or investment;

6. To promote, or assist in promoting any other company, and to subscribe for, buy and sell debentures, mortgage debentures, stocks, bonds and securities of any other company, and otherwise to employ the money or credit of the company in any manner deemed expedient for any such purposes, either by actually employing any portion of the moneys of the company for such purposes or by placing on the market, or underwriting, or guaranteeing the issue of, or the payment of interest on the shares, debentures, mortgage debentures, or securities of any other company; to act as agent for the purpose of collecting and converting into money its securities and property pledged, and to administer, close and wind up the business of estates, persons, partnerships, associations or corporate bodies, and to do such incidental acts and things as are necessary for such purposes;

7. To act as trustee in respect of any debenture, bond, mortgage, hypothec or other security, issued according to law, by any municipal or other corporation incorporated in the Province of Quebec, or elsewhere, or by any province of Canada, or by the Dominion of Canada, or on foreign legislation or authority;

8. To accept and hold the office and perform all the duties of receiver, trustee, assignee, trustee for the benefit of creditors, sequestrator, guardian, liquidator, executor, administrator and curator to insolvent estates, if appointed thereto by any person, either by deed, *inter vivos*, or by last will and testament, or by any court notwithstanding the provisions of articles 364, 365, 366 and 367 of the Civil Code, preventing a corporation from acting in any of the said capacities, which articles shall in no wise affect the said company;

9. Besides the real estate acquired and held by the company in the course of the due carrying on of its business, to acquire, lease, hold and convey real estate to an amount not exceeding one million dollars, and in addition thereto:

(a) Such real estate as may be taken by it in compromise or payment of any preexisting indebtedness;

(b) Such as may be purchased by it at any judicial or other sale, in foreclosure, or for the enforcement of any claim, mortgage, trust or agreement in the nature of a pledge or mortgage of the same, acquired or taken by the company in the course of the due carrying on of its business;

10. To guarantee the title to or quiet enjoyment of property, either absolutely or subject to any qualifications and conditions, and to guarantee any persons interested or about to become interested in or owning or about to purchase or acquire any real property, against any losses, actions, proceedings, claims or demands by reason of any insufficiency or imperfection or deficiency of title, or in respect of encumbrances, burdens or outstanding rights; also to guarantee any company, corporation, person or persons against any loss or damage by reason of the failure on the part of any company, corporation, person or persons to make due payment of the whole or any part of any loan, advance, mortgage, bond, debenture or claim, hypothecary or otherwise, or the interest thereon, and to issue its guarantee certificates or policies in such form as it may determine, and for such remuneration as it may fix;

11. To borrow money at such rates of interest as may be agreed upon, with full power to secure such loans by any mortgages, hypothecs, stocks, bonds or other securities of or belonging to the company;

12. To examine, report upon and audit the books, accounts, condition and standing of corporations, partnerships and individuals, when requested or authorized so to do by such corporations, partnerships or individuals, and also when required by an order of a court of competent jurisdiction;

13. To buy, sell, and invest in the stock, bonds, debentures, or obligations of municipal or other corporations, whether secured by mortgage or otherwise, or in Dominion, provincial, British, foreign or other public securities, and to purchase shares in the capital stock of other trust companies or other corporations doing a similar business, and to purchase the assets of any of the said companies, or to amalgamate with any of the said companies;

14. To guarantee any investment made by the company as agent or otherwise;

15. To sell, pledge, mortgage or hypothecate any mortgage or other security or any other real or personal property held by the company from time to time;

16. Generally to charge for, collect and receive all agreed or reasonable remuneration, legal, usual and customary costs, charges and expenses for all or any of the services, duties, trusts or things, rendered, observed, executed or done, in pursuance of any of the powers of the company.

IV. Subject to the provisions of the act 63 Victoria, chapter 44, the company may be surety upon any bond required in any judicial proceeding, and, subject to the discretion of the court, judge, or official receiving such bond, the surety of the company shall suffice in all cases where two sureties are now required.

The company may arrange for, receive, and re-

cover if necessary, such remuneration as may be agreed upon for being such surety.

The company may execute the security bond by the manager or secretary signing it for the company and attaching the company's seal thereto.

A complete record of all such bonds shall be kept at the head office of the company, and shall be, at all reasonable hours, open for the inspection hereinafter provided.

V. The directors of the company may, with the consent of the shareholders, at a special meeting duly called for the purpose, create and issue debenture stock, in such amounts and manner, on such terms and bearing such rate of interest, as the directors, from time to time, think proper, but such debenture stock shall be treated and considered as part of the ordinary debenture debt of the company, and shall be included in estimating the company's liabilities to the public, and such debenture stock shall rank equally with such ordinary debenture debt, and no greater rights or privileges shall be conferred upon holders of debenture stock in respect thereof than are held or enjoyed by holders of ordinary debentures of the company.

The debenture stock aforesaid shall be entered by the company in a register to be kept for the purpose in the head office of the company, wherein shall be set forth the names and addresses of those, from time to time, entitled thereto, with the respective amounts of the said stock to which they are respectively entitled, and such stock shall be transferable in such amounts and in such manner as the directors may determine. The said register shall be accessible for inspection and perusal, at all reasonable times, to every debenture-holder, mort-

gatee, bond-holder, debenture stockholder; and shareholder of the company, without the payment of any fee or charge.

All transfers of debenture stock of the company shall be registered at the head office of the company, and not elsewhere; but the said transfers may be left with such agent or agents in the United Kingdom of Great Britain and Ireland as the company appoints for that purpose, for transmission to the company's head office for registration.

The holders of the ordinary debentures of the company may, with the consent of the directors, at any time, exchange such debentures for debenture stock.

The company, having issued debenture stock, may, from time to time, as it thinks fit, and for the interest of the company, but only with the consent of the holders thereof, buy up and cancel the said debenture stock or any portion thereof.

VI. The company shall be managed by a board of directors of not more than fifteen and not less than five in number and the said William Cassils McIntyre, Edmund Arthur Robert, James George Ross, Frank Howard Wilson and George Ross Robertson shall be the first or provisional directors of the company, and shall hold office until the first election of directors.

The board of directors may, from time to time make out and adopt any by-laws specifying the conditions and qualifications required of a shareholder to be eligible as director of the company, and such by-laws may be altered, amended, modified or repealed; provided always that no such by-laws, passed in virtue of this section, shall be valid or acted upon until sanctioned by a resolution of the company, passed and approved of by a major-



ity of the shareholders of the company, voting by person or proxy at a special general or annual general meeting of the company, duly called by notice and stating that such by-law or by-laws shall be submitted to such meeting.

The directors may, from time to time, by by-law, delegate such of their powers as they may see fit to an executive committee, consisting of not less than three members of the board.

VII. The provisional directors are authorized to open stock-books, procure subscribers thereto, and to call a general meeting of shareholders, and generally to do all such other acts as may be necessary for the organization of the company.

VIII. The capital stock of the company shall be one million dollars, divided into ten thousand shares of the value of one hundred dollars each. The company shall not commence business until five hundred thousand dollars of its authorized capital have been subscribed and two hundred and fifty thousand dollars have been paid up.

IX. The capital stock of the company may be increased, to an amount not exceeding five million dollars, by a vote of the majority of shareholders present at a meeting duly called for the purpose; and such stock shall be issued, sold or allotted as the directors may determine, or as may be defined by a by-law passed by the shareholders.

Notice of such increase shall be given by the company in the *Quebec Official Gazette*, by an advertisement inserted three times consecutively.

X. At all meetings of shareholders, shareholders shall have one vote for every share held by them and may vote by proxy in the hands of another shareholder.

XI. At each annual meeting it shall be the duty of the shareholders present to estimate and establish by resolution the real value of the shares of the company's capital stock, such estimation to be based on the financial results of the company's operations as shown by the statement of its affairs before them; and if, at any time during the course of the following year, any shares of the company's capital stock are offered for sale, or if the sale has not been recorded in the company's books, or if they have been transmitted by legacy, inheritance, the marriage of a female shareholder, or in any other manner whatsoever, then the said company or one or a greater number of the shareholders of the company, shall, during the two months after such sale, offer of sale or transfer shall have been served upon the company, have the privilege of acquiring the shares so offered for sale or transferred as aforesaid, on payment or offer of the price of such shares calculated according to their value as established at the last annual meeting of the company; the company having the first privilege of acquiring them and afterwards the shareholders, after such delay to allow the company to deliberate and after such order and on such conditions as regards the respective shareholders, as may be determined by the by-laws of the company.

XII. The president, the vice-president, and the secretary or manager of the company, shall be liable to coercive imprisonment, personally, in those cases in which individuals exercising the same function would be liable.

XIII. In the investment of any moneys received by the company in any of the capacities or qualities set forth in article 9810 of the Civil Code, the company shall be subjected to the provisions of the said article.

XIV. Notwithstanding any law or rule of practice to the contrary, whenever the company is appointed to any office, it shall not be required to give any security other than its own bond for the due performance of its duties in connection with such office, unless the court see fit otherwise to direct.

XV. The moneys and securities of each trust shall always be kept distinct from those of the company and in separate accounts, and so marked in the books of the company for each particular trust as always to be distinguished from any other, in the registers and other books of accounts kept by the company, so that at no time shall trust moneys form part or be mixed with the general assets of the company; and the company shall, in the receipt of rents, and in the overseeing and management of trust and other property, keep distinct records and accounts of all operations connected therewith; and such trust moneys and other property shall not be liable for the ordinary debts and obligations of the company.

XVI. When the amount due for the use of any safe or box in the vaults of the company shall not have been paid for one year, the company may, at the expiration of such year, cause to be sent to the person or persons in whose name such safe or box stands upon the books of the company, a notice in writing contained in a securely closed postpaid registered letter directed to such person or persons at his or their respective post-office address or addresses, as recorded in the books of the company, notifying such person or persons that, if the amount then due for the use of such safe or box is not paid within sixty days from the date of such notice, the company will then cause such safe or box to be opened in accordance with the provisions of this section;

and, if such amount be not paid within such sixty days, the company may cause such safe or box to be opened in the presence of the president or managing director or secretary of the said company and of a notary public, not an officer or in the employ of said company, and the contents thereof, if any, to be sealed up by such notary public in a package, upon which said notary shall distinctly mark the names and addresses of the person or persons in whose name or names such safe or box stands upon the books of the company, and the estimated value thereof, and the packages so sealed and addressed, when marked for identification by such notary, shall be deposited by him in one of the general safes or boxes of the company.

XVII. The company shall make an annual report of its operations to the lieutenant-governor in council.

XVIII. This act shall come into force on the day of its sanction.

AN ACT TO AMEND THE CHARTER OF  
THE IMPERIAL TRUST COMPANY  
(6th Edward VII. Chapter 74)  
(Assented to 9th March, 1906)

WHEREAS, the Imperial Trust Company, a body politic and corporate, incorporated by the Legislature of the Province of Quebec, 5 Edward VII, chapter 79, is desirous of obtaining further powers granted by its said act of incorporation, to-wit, for authorization to empower the said company to receive money on deposit and allow interest on the same, with other powers incidental thereto;

Therefore, His Majesty, with the advice and consent

of the Legislative Council and of the Legislative Assembly of Quebec, enacts as follows:

I. The Act 5 Edward VII, chapter 79, is amended by the addition to section 3 of the following paragraphs:

“17. To receive money on deposit and allow interest on the same;

“18. To purchase bills of exchange and generally do an exchange business with Great Britain and Ireland, British possessions and foreign countries.”

II. This act shall come into force on the day of its sanction.

TRUST COMPANY BY-LAWS  
BY-LAWS OF AN ILLINOIS TRUST  
COMPANY

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ARTICLE I

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Meetings of Stockholders

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§ 1. **Annual Meeting.** The regular annual meeting of the stockholders shall be held at the principal office of the company in the City of Chicago, Illinois (unless some other place is designated by the Board of Directors or Executive Committee), at two (2) o'clock p. m., on the second Monday of January, in each year, for the election of directors and the transaction of such other business as may come before the stockholders for action. If the day fixed for any annual meeting shall be a legal holiday, it shall be held on the next succeeding day. If for any reason the annual meeting shall not be held at the time herein provided, the same may be held at any time thereafter upon notice, as hereinafter provided, or the business thereof may be transacted at any special meeting called for that purpose.

§ 2. **Special Meetings.** Special meetings of the stockholders may be called by the President, Board of Directors or Executive Committee whenever they deem it necessary, and it shall be their duty to order and call



such meetings whenever persons holding one-fifth (1/5) of the outstanding capital stock of the company shall, in writing, request the same. Such special meetings shall be held at the principal office of the company, in the City of Chicago (unless some other place be designated by the President, Executive Committee or Board of Directors), in the same manner as the annual meeting.

**§ 3. Notice of Meetings.** Notice of the time and place of the annual and of any special meeting of the stockholders shall be given by the Secretary to each of the stockholders by posting the same in a postage pre-paid letter, addressed to each stockholder at his last known place of business or residence, or by delivering the same personally, at least ten (10) days before the meeting. The notice of a special meeting shall also set forth the objects of the meeting, and the business of such special meeting shall be confined to the objects stated. A failure to mail notice of the annual meeting shall not invalidate the proceedings of the meeting.

Any or all of the stockholders may waive notice of any meeting, and the presence of a stockholder at any meeting shall be deemed a waiver of notice thereof by him. Meetings of the stockholders may be held at any time, without notice, when all of the stockholders are present in person or by proxy, or when all of the stockholders waive notice, and consent to the holding of such meeting.

**§ 4. Voting.** At all meetings of the stockholders each stockholder shall be entitled to one vote for each share held by him, which vote may be given personally or by proxy authorized in writing; and, at elections for Directors, such votes may be cast cumulatively, in accordance with law. At each meeting of the stock-

holders a full, true and complete list, in alphabetical order, of all the stockholders entitled to vote at such meeting, indicating the number of shares held by each, and certified by the Secretary, shall be furnished. Only the persons in whose names shares of stock shall stand on the books of the company at the time of the closing of the transfer books for such meeting, as evidenced by the list of stockholders so furnished, shall be entitled to vote at such meeting.

At each meeting of the stockholders the polls shall be opened, the proxies and ballots shall be received and taken in charge, and all questions touching the qualifications of voters, the validity of proxies, and the acceptance or rejection of votes, shall be decided by three inspectors. Such inspectors shall be appointed by the Board of Directors before or at the meeting, or if no such appointment shall have been made, then by the presiding officer at the meeting. If, for any reason, any of the inspectors previously appointed shall fail to attend, or refuse, or be unable to serve, inspectors in place thereof shall be appointed in like manner. No person shall be appointed an inspector who is a candidate for election as a Director.

**§ 5. Quorum.** The holders for the time being of a majority of the total number of shares of stock issued and outstanding, represented in person or by proxy at any meeting of the stockholders, shall constitute a quorum for the transaction of business, unless the representation of a larger number shall be required by law. In the absence of a quorum, the stockholders attending or represented at the time and place at which a meeting shall have been called may adjourn such meeting from time to time until a quorum shall be present,

and at any adjourned meeting at which a quorum shall be present any business may be transacted which might have been transacted by a quorum of the stockholders at the meeting as originally convened.

**Section 6. Presiding Officer and Secretary.** The President, and in his absence a Vice-President, shall call meetings of the stockholders to order and shall act as Chairman of such meetings. In the absence of the President and Vice-Presidents, the stockholders present or represented at the meeting may elect a Chairman to preside at the meeting. The Secretary, and in his absence an Assistant Secretary, shall act as Secretary at all meetings of the stockholders, but in the absence of the Secretary and Assistant Secretaries, the stockholders or presiding officer may appoint any person to act as Secretary of the meeting for the time being.

## ARTICLE II

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### Board of Directors

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**§ 1. Number and Qualifications.** The property and business of the company shall be managed and controlled by a Board of Directors. The Board shall consist of twenty-five (25) members, who shall hold office for one year and until their successors are elected and qualified. No person shall be elected a Director unless such person shall own in his own name, free of any lien or incumbrance, at least ten (10) shares of the capital stock of the company.

**§ 2. Vacancies.** In case of any vacancies in the Directors, through death, resignation, disqualification or other cause, the remaining Directors, by the affirma-

tive vote of two-thirds (2/3) thereof, shall have power to appoint the members necessary to make up the full number, but such appointment shall continue only until the next annual meeting of the stockholders or until their successors are elected and qualify.

**§ 3. Quorum.** The Directors shall act only as a board, and an individual director shall have no power as such. Nine directors at a meeting duly called shall constitute a quorum for the transaction of business; but a less number may adjourn from time to time until a quorum shall be present.

**§ 4. Meetings.** Regular monthly meetings of the Board of Directors shall be held at the office of the company in Chicago, Illinois, at the hour of three o'clock p. m., on the fourth Tuesday of each month (if not a legal holiday, and if a legal holiday on the next succeeding day not a legal holiday), for the transaction of any business which may come before the Board. Special meetings of the Board shall be held whenever called by the President, Executive Committee or any three directors. At the monthly meeting next following the annual meeting of the stockholders the directors shall elect the officers of the company.

**§ 5. Notice of Meetings.** Notice of each regular or special meeting of the Board of Directors shall be mailed by the Secretary to each director at his last known place of business or residence not later than three o'clock p. m. on the day previous to that fixed for the meeting. Provided, however, that in case, in the judgment of the President, a sudden emergency requires, the President may call a special meeting upon notice delivered or telephoned to each director to his usual place of business (or to his residence if he have no usual place of business) at

least one hour before the time fixed for the meeting. The notice of a special meeting need not state the objects thereof. Meetings of the Board may be held at any time, and for any purpose, without notice, when all the members are present or whenever all of the directors shall waive notice and consent to the holding thereof. All, or any of the directors, may waive notice of any meeting, regular or special, and the presence of any director at a meeting of the Board shall be deemed a waiver of notice thereof by him.

**§ 6. Presiding Officer.** At all meetings of the Board of Directors, the President, or in his absence a Vice-President, shall preside, and the Secretary, or an Assistant Secretary, shall record the proceedings of the meeting.

**§ 7. Compensation.** For his attendance at any meeting of the Board of Directors each director, not an officer of the company, attending such meeting shall receive the sum of twenty dollars, and for his attendance at any meeting of any committee each director, not an officer of the company, attending such meeting shall receive the sum of ten dollars.

### ARTICLE III

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#### Executive Committee

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**§ 1. Number and Qualifications.** The Board of Directors shall annually appoint from its own members (other than officers of the company) such number of persons, not less than seven (7), as it may determine, as an Executive Committee, of which the President, or

in his absence the ranking Vice-President, shall be ex-officio an additional member. The Board of Directors shall promptly fill vacancies in the Executive Committee by election from the directors.

**§ 2. Powers.** During the intervals between the meetings of the Board of Directors the Executive Committee shall possess and exercise each and all the powers of the Board of Directors in the management and direction of the business and affairs of the company, in such manner as the Executive Committee shall deem best for the interests of the company, in all cases in which specific directions shall not have been given by the Board.

Except as otherwise provided by the by-laws or by resolution of the Board of Directors, all salaries and compensations paid or payable by the company shall be fixed by the Executive Committee.

The Executive Committee shall keep minutes of its proceedings and shall report its action to the Board of Directors at its meeting next succeeding such action, and its action shall be subject to revision or alteration by the Board, provided that no rights or acts of third parties shall be affected by any such alteration or revision.

**§ 3. Rules.** The Executive Committee shall adopt its own rules of procedure, but in every case the vote of at least three (3) members of the committee shall be necessary to its adoption of any resolution. Such committee shall meet on Monday of each week at such time and place as may be provided for by the rules of said committee. It may meet at such other times and places and upon such notice, or without notice, as may be provided by its rules or by resolution of the committee.



## ARTICLE IV

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### Officers

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§ 1. **Appointment and Tenure.** The Executive officers of the company shall be a President, one or more Vice-Presidents, a Cashier, one or more Assistant Cashiers, a Secretary, one or more Assistant Secretaries, a Trust Officer, one or more Assistant Trust Officers and General Counsel. The Board of Directors or President may appoint such other officers as it or he shall deem necessary, with such powers and duties as from time to time may be prescribed by the Board of Directors. The Board of Directors may at any time confer upon the President or Executive Committee the power to select and appoint any officers of the company. All officers and agents shall be subject to removal at any time by the affirmative vote of a majority of the whole Board of Directors. All officers, agents and employes, other than officers appointed by the Board of Directors, shall hold office at the discretion of the committee or of the officer appointing them. Any officer or employe of the company may be required by the Board of Directors, Executive Committee or President to give to the company a bond in such amount and containing such conditions as the Board of Directors, Executive Committee or President may require, and any such bond may be the undertaking of a surety company and the premium therefor may be paid by the company.

§ 2. **The President.** The President shall preside at all meetings of the stockholders and of the Board of Directors. Subject to the Board of Directors and Executive Committee, he shall have general charge and

supervision of the business of the company, and its officers and employes, and may sign and execute all authorized bonds, contracts, deeds and other instruments in writing in the name of the company.

Subject to the Board of Directors and Executive Committee, he shall have power to select and appoint all necessary officers and servants of the company, except those selected by the Board or Executive Committee; and may remove such officers or servants (except those selected by the Board or Executive Committee) whenever he shall deem it necessary and make new appointments to fill the vacancies. He shall have authority to sign all checks, drafts and orders for the payment of money issued by the company in the usual course of its business, subject to the counter-signature of the teller as hereinafter provided. He shall have power to suspend any of the officers or heads of departments until the Board or Executive Committee shall be convened, and to dismiss any of the subordinate employes whenever he shall think fit and proper to do so. In the event of the death, disability or more than temporary absence of the President, the Executive Committee may designate any person as acting President, who shall for the time being be vested with all the powers and required to perform all of the duties of the President. Such person shall be known as the Acting President of the company.

**§ 3. The Vice-Presidents.** The Vice-Presidents shall, in the order designated by the President, except as herein otherwise provided, be vested with all the powers and required to perform all the duties of the President, in the event of his absence or disability, and may in any event sign and execute all authorized bonds, contracts, deeds and other instruments in writing in the

name of the company with like effect as though signed by the President. They may countersign certificates of stock. They may sign checks, drafts and orders for the payment of money, issued by the company in the usual course of its business, subject to the countersignature of the teller, as hereinafter provided. They shall perform such other duties as may from time to time be prescribed by the Board of Directors, Executive Committee or President.

**§ 4. The Cashier.** The Cashier shall have charge of the funds, receipts and disbursements of the company, and of the receiving of all deposits and the paying out of all sums of money. He shall see to the collection of all dividends, interest and other payments due on account of securities owned by the company. He shall, jointly, with the President or such other person as may be designated by him, be the custodian of all securities, notes and other evidences of indebtedness belonging to the company, and they shall be kept in such place or places, and in such manner as may be designated by the President, Executive Committee or Board of Directors. He shall keep full and accurate books of account, showing all the receipts and disbursements of the company. He shall furnish to the President, Executive Committee or Board of Directors, on demand, a detailed account of the receipts and expenditures of the corporation for any specified period, and his books and papers shall, at all times, be open and subject to the inspection and scrutiny of the President, Executive Committee and Board of Directors, or their appointees. He shall render to the President, Board of Directors or Executive Committee, whenever required, a statement of all his transactions as Cashier, and of the financial condition of the company.

He may sign (subject to countersignature, as provided in these by-laws) checks, drafts and orders for the payment of money, executed by the company in the usual course of its business, and may endorse, on behalf of the company, checks, drafts and orders for the payment of money which it may receive in the usual course of its business.

**§ 5. Assistant Cashiers.** The Assistant Cashiers (subject to countersignature, as provided by these by-laws) shall have power to sign checks, drafts and orders for the payment of money issued by the company in the usual course of its business, and to endorse checks, drafts and orders for the payment of money which may be received by the company in the usual course of its business. They shall perform such other duties as may, from time to time, be prescribed by the President, Executive Committee or Board of Directors.

In the absence or disability of the Cashier, they shall be vested with all his powers and required to perform all his duties.

**§ 6. The Secretary.** The Secretary shall record all the votes and proceedings of the stockholders, directors and Executive Committee in a book, or books, kept for that purpose. He shall attend all meetings of the stockholders, directors and Executive Committee. He shall keep in custody the seal of the company, and when authorized by the Board of Directors or Executive Committee, or when any instrument requiring the corporate seal to be attached shall have first been signed by the President, or any one of the Vice-Presidents duly authorized to sign the same, or when necessary to attest any proceedings of the stockholders, directors or Executive Committee, shall affix it to any instrument requir-

ing the same, and shall always attest the same by his signature. He shall have charge of such books, documents and papers of the company as properly belong to his office, and shall perform such other duties as pertain to his office, or as the President, Executive Committee or Board of Directors may require.

He shall keep the accounts of stock registered and transferred in such manner and form and under such regulations as the Board of Directors, Executive Committee or President may prescribe. In the absence of the Secretary at any meeting of the stockholders, directors or Executive Committee, the record of the proceedings of such meeting shall be kept and authenticated by an Assistant Secretary, or by such person as may be appointed for that purpose at the meeting.

**§ 7. The Assistant Secretaries.** Each Assistant Secretary shall possess the same powers and duties as the Secretary, and any act may be done or duty performed by an Assistant Secretary with like effect as though done or performed by the Secretary.

**§ 8. The General Counsel.** Subject to the Board of Directors and Executive Committee, the General Counsel shall have supervision and management of all matters of legal import concerning the company and of all litigation in which it is in any way interested; and shall when and as requested pass upon the form and sufficiency of all contracts, trusts and undertakings of the company.

**§ 9. The Trust Department.** The President shall designate one of the Vice-Presidents to have charge of the Trust Department. Subject to the order, advice and direction of the President (and in the case of trusts involving extraordinary or unusual responsibility, of the

Executive Committee), such Vice-President shall have general charge and control of the acceptance and execution of any trusts in charge of the company. He shall, jointly with the cashier, be the custodian of all the securities and other property held by the company as trustee, and all the funds, securities and property held by the company as trustee shall be kept separate and apart from the funds of the company, except that funds held temporarily for investment or distribution may be deposited with the Banking Department pending such investment or distribution. He shall keep a full and accurate record of the receipt and disposition of all such securities, funds and property.

If, in addition to the Vice-President in charge of the Trust Department, there shall at any time be a trust officer, such trust officer shall, subject to the advice and approval of the President or the Vice-President in charge of the Trust Department, perform such duties as usually appertain to the office of trust officer. He or the Vice-President in charge shall approve in writing all papers and documents of any kind which shall be executed by the company in its capacity as trustee, and the approval by either of them on all ordinary instruments required in the conduct of the Trust Department shall be sufficient authority for the execution thereof by the President, or a Vice-President, and the Secretary, or an Assistant Secretary. The Trust Officer shall have the power, together with the Secretary or Assistant Secretary, to execute in behalf of the company all documents relating to the discharge of its routine duties in any fiduciary relation. He may sign (subject to counter-signature by the teller, as provided in these by-laws) checks, drafts and orders for the payment of money



executed by the Trust Department in the usual course of its business.

§ 10. **Bond Department.** The Bond Department shall be under the order and advice of the President and in his absence the Vice-Presidents; it shall be further under the superintendence of the manager of said department. Daily reports in writing of all purchases, sales or exchanges made by the Bond Department shall be made to the President or Vice-President in charge, and weekly reports of the same shall be made to the Executive Committee.

§ 11. **Real Estate Loan Department.** The Real Estate Loan Department shall be under the control and advice of the President, and in his absence the Vice-Presidents, and under the superintendence of the manager of said department. It shall be the duty of the manager to investigate the title and value of the security upon any loan proposed to be made by this department. Daily reports in writing of all loans made and of any defaults in payment thereof shall be made to the President or Vice-President in charge, and weekly reports of the same shall be made to the Executive Committee. The manager shall also report daily to the Trust Department all transactions in which this company is designated as trustee under any such loan.

## ARTICLE V

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### Conduct of Business

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§ 1. **Contracts.** No agreement or contract, other than a check or draft, involving the payment of money or the credit or liability of the company, shall be made without the approval of the Board of Directors

or Executive Committee, except that the President, or Vice-President discharging his duties, may, in the ordinary course of business of the company, make contracts or obligations not involving a liability in excess of twenty-five thousand dollars (\$25,000); and may also, in the ordinary course of the business of the company (and subject to the limitations contained in these by-laws), loan money, make discounts, receive deposits and accept and execute trusts in such manner as is usual to banking and trust institutions.

All contracts, deeds and other instruments that require the corporate seal of the company to be affixed shall be signed by the President or a Vice-President and the Secretary or an Assistant Secretary.

**§ 2. Checks and Drafts.** All checks, drafts and other negotiable instruments which shall be issued by the company shall be signed by the Cashier, or an Assistant Cashier, or by the President or a Vice-President, and shall be countersigned by the teller drawing the same. Checks against Trust Department funds pertaining to the business of that department may be signed by the Trust Officer.

**§ 3. Borrowing Money.** No money shall be borrowed on behalf of the company without the authority of the Board of Directors or Executive Committee.

**§ 4. Limitations as to Loans.** No loan of Company or trust funds shall be made to any officer or employe of the company.

**§ 5. Loans of Company Funds.** Loans and investments of company funds shall be made in such manner as the Board of Directors or Executive Committee may from time to time direct.

**§ 6. Loans of Trust Funds.** Loans and investments of trust funds shall be made only in the following manner:

If the loan or investment is of a sum of \$5,000 or under it shall be approved by the President or one of the Vice-Presidents. If the loan or investment is of a sum in excess of \$5,000 it shall be approved by the President or one of the Vice-Presidents and at least two (2) members of the Executive Committee.

## ARTICLE VI

### Shares and Their Transfer

**§ 1. Stock Certificates.** Each holder of stock shall be entitled to a certificate signed by the President or a Vice-President, and the Secretary or an Assistant Secretary. All such certificates shall be issued in consecutive order from certificate books and shall be numbered and registered in the order in which they are issued; and on the stub of each certificate shall be noted the name of the holder, together with the number of shares and the date of such certificate; and in case of cancellation, the date of cancellation.

The person receiving any such certificate shall personally, or by agent, sign on the stub a receipt for the certificate issued to him.

Every certificate returned to the company for exchange of shares shall be canceled and pasted in its original place in the stock certificate book, and no new certificate shall be issued until the old certificate has thus been canceled and returned to its original place in such book, except in cases provided for in section four (4) of this article.

§ 2. **Registrar of Transfers.** The Board of Directors may appoint a registrar of transfers of stock in the City of Chicago or elsewhere, and, after the appointment of such registrar of transfers, no certificate of stock shall be binding upon the company or have any validity unless signed by such registrar of transfers.

§ 3. Transfers of stock shall be made only upon the books of the company by the holder, in person, or by his power of attorney duly executed, and on the surrender of his certificate or certificates for such shares. For convenience the Board may appoint a transfer agent of the company's stock.

The transfer books may be closed for such period as the Board shall direct previous to and on the day of any annual or special meeting of the stockholders. The transfer books may also be closed by the Board for such period as may be deemed advisable for dividend purposes.

§ 4. **Lost and Destroyed Certificates.** The Board of Directors may direct a new certificate or certificates to be issued in place of any certificate or certificates theretofore issued by the company, alleged to have been lost or destroyed; and the Board, in authorizing the issuance of such new certificate or certificates, may require the owner of such new certificate or certificates, or his legal representatives, to give to the company a bond issued by an approved surety company in such sum as they may direct, as indemnity against any claim that may be made against the company.

## ARTICLE VII

### Seal

The company's corporate seal is, and until other-

wise ordered by the Board, shall be, an impression upon paper or wax, bearing the words: "Blank Trust Company of Illinois. Corporate Seal. 1902."

## ARTICLE VIII

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### Dividends

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Dividends may be declared by the Board of Directors out of the net profits of the company payable at any such time or times and in such manner as may be determined by the Board.

## ARTICLE IX

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### Amendments to By-Laws

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These by-laws may be altered, amended or repealed by the Board of Directors at any meeting, regular or special, by the affirmative vote of a majority of the whole Board.

By-Laws of Blank Trust Company of New York

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Adopted December 8, 1903

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## ARTICLE I

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### Directors

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SECTION 1. The business and affairs of the Company shall be managed by a Board of Directors, consisting of thirty (30) persons, each of whom shall continue in office from the time of his election until the next annual meeting of the stockholders, or until another is

elected in his place. This section may from time to time be amended by resolution of the Board of Directors to fix the number of directors at any number not less than thirteen (13) nor more than thirty-five (35).

SEC. 2. A majority of the directors shall constitute a quorum for all purposes at any meeting of the Board.

SEC. 3. Any vacancy that may occur in the Board of Directors by reason of death, resignation, increase in the number of directors or otherwise, may be filled by the remaining directors at any regular meeting or at any special meeting, provided that if such vacancy is filled at a special meeting a written notice of such vacancy, and that it is proposed to fill the same, shall have been mailed to each director three days previous to such special meeting.

SEC. 4. The regular meetings of the Board of Directors shall be held on the second Tuesday of each month, at such hour and place as shall be designated by the Board.

SEC. 5. The Directors may call special meetings of the stockholders as often as they may deem expedient. The Secretary shall give not less than ten days' notice of any such meeting by mailing to each stockholder of record a notice thereof, addressed to his last known place of residence or business to the best information had by the Secretary.

SEC. 6. An Executive Committee shall annually be elected by the Directors which shall consist of nine (9) Directors who shall hold office until others are elected in their places. All vacancies in such committee may be filled by the Directors at a regular meeting, or at a special meeting called for that purpose.

SEC. 7. The President may whenever deemed



proper by him, and shall whenever requested in writing by three of the Directors, or by the owners of one-third of the capital stock call special meetings of the Directors. The call for such meetings shall specify the objects thereof and shall be sent to each director not less than one day previous to such meeting.

SEC. 8. The Directors may require of all officers of the Company, except the President and First Vice-President, and of all employes and clerks, satisfactory bonds for the performance of their duties.

SEC. 9. At each annual meeting of the Stockholders, the Directors shall submit a statement showing the situation of the property and financial affairs of the Company, and shall also submit such statement at any special meeting of the Stockholders when requested by them so to do.

SEC. 10. All elections by the Directors shall be by ballot and the vote of the majority of the whole number of the Directors shall be necessary for a choice.

SEC. 11. Every Director who shall for three successive Directors' meetings omit to attend such meetings without an excuse satisfactory to the Board of Directors, may be notified by the Secretary that he is presumed to be desirous of resigning his office as Director, and unless such Director shall at the next regular meeting present an excuse for his absences satisfactory to the Board, his tenure of office may, without further notice to him, be declared to be terminated and the Board may at its pleasure fill the vacancy.

SEC. 12. The Board of Directors shall assemble immediately after the annual election for the election of officers for the ensuing year.

## ARTICLE II

### Officers

SECTION 1. The officers of the Company shall be, a President, a First Vice-President, a Second Vice-President, a Third Vice-President and a Fourth Vice-President, to be elected by the Board of Directors, and a Secretary and a Treasurer, one or more Assistant Secretaries, one or more Assistant Treasurers, a Trust Officer and such other officers as shall from time to time be designated by the Board of Directors, to be appointed by the Board. All of the officers so elected or appointed shall hold their offices respectively during the pleasure of the Board, except the President and First Vice-President, who shall hold their offices from the time of their election until the second Thursday of January next ensuing and until others are elected in their stead.

## ARTICLE III

### President

SECTION 1. The President shall preside at all meetings of the Directors and Executive Committee, and shall be ex-officio member of the Executive Committee. He shall have power to make contracts and accept such trusts for the Company as in his judgment may be executed by it and shall at all times exercise a general supervision of the business, affairs, and property, of the Company. He shall report at each meeting of the Executive Committee all trusts accepted, loans made and contracts entered into by the Company. He shall appoint all clerks and servants of the Company and may suspend or remove them at his pleasure.

From time to time, at least once in each quarter,

the President shall appoint a Committee of not less than three Directors, whose duty it shall be to make a thorough examination of the affairs of the Company, with discretionary power to employ expert accountants to that end; to count the cash on hand, the securities owned or held in trust, and as collateral for loans, and compare the assets and liabilities so found, with the amounts stated in the books of the Company, and report thereon.

In each month in which a quarterly examination does not occur, the President shall appoint a Committee of one or more Directors, who shall on such day as he or they may select and without notice, count the cash on hand, and compare the amount so found with the general ledger of the Company, and report thereon.

The reports of the above Committees shall be signed by each member of the Committee, or at least by a majority thereof, and shall be filed among the records of the Company.

SEC. 2. In case of the death, absence, or inability of the President, his powers shall be exercised and his duties discharged by the First Vice-President, or, in case of his absence by the Second Vice-President; or in case of absence of the President, the First and Second Vice-Presidents, by the Third Vice-President; or in case of the absence of the President, the First, the Second and the Third Vice-Presidents, by the Fourth Vice-President.

## ARTICLE IV

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### Secretary

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SECTION 1. The Secretary shall keep the minutes of all meetings of the Stockholders, Board of Directors,

Executive Committee and all other Committees that may require his services, and perform such other duties as the President or Board of Directors shall from time to time direct. In the absence or disability of the Secretary, the Treasurer, or, an Assistant Secretary, or an Assistant Treasurer, as the President may designate, shall perform his duties.

## ARTICLE V

### Treasurer

SECTION 1. The Treasurer shall keep or cause to be kept permanent records of the evidences of property, or indebtedness and of all financial transactions of the Company. He shall be the custodian of the funds and securities of the Company, subject to the supervision of the President or Vice-Presidents, and shall perform such other duties as the President or Board of Directors shall from time to time direct. In the absence or disability of the Treasurer, the Secretary or an Assistant Secretary, as the President may designate shall perform his duties.

## ARTICLE VI

### Trust Officer

SECTION 1. The Trust Officer shall give his special attention and supervision to the various trusts accepted by this Company and shall see that proper records thereof are kept.

## ARTICLE VII

### Executive Committee

SECTION 1. Whenever any stock shall be trans-

ferred to the Company as security for a debt or loan or shall be held by the Company as an investment or as Trustee, Guardian, Executor or Administrator, or shall be transferred to the Company under and pursuant to the execution of any trust whatever, the Executive Committee shall have power to direct the President or the First Vice-President to sell, assign and transfer the same, and when necessary, to affix the seal of the Company to such transfer with the same force and effect as the Board of Directors might exercise in such case.

SEC. 2. The Executive Committee shall superintend and advise all investments that shall be made of the funds of the Company in stocks, personal securities, and bonds and mortgages; and shall superintend all special trusts. The Executive Committee may in its discretion, authorize the President to make investments in personal securities without previously consulting the Committee; but all such transactions shall be reported to the Committee at its next meeting.

SEC. 3. The Executive Committee shall meet at one of the offices of the Company on one day of every week and at such other times as they may appoint.

SEC. 4. Four members of the Executive Committee, together with the President or First Vice-President, or a majority of the Committee, if the President or first Vice-President be absent, shall constitute a quorum for the transaction of business.

SEC. 5. The Executive Committee shall fix the compensation and may define the duties of all officers, clerks and employes, except as specifically provided in these by-laws.

## ARTICLE VIII

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### Stockholders

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SECTION 1. The annual meeting of the Stockholders shall be held at the principal office of the Company on the second Thursday of January of each year at 3 P. M. and the polls shall remain open until 4 P. M. Notice of the time and place of holding such meeting shall be given as required by law and shall be mailed to each stockholder at his last known residence or place of business, at least two weeks before such meeting.

SEC. 2. No business shall be transacted at a special meeting of the Stockholders not specified in the call for such meeting or at an adjourned special meeting not specified in the original call.

SEC. 3. Three Inspectors of Election shall be elected at each annual meeting of the Stockholders, to serve at the next succeeding annual meeting. In case of failure of any Inspector to attend or serve, the vacancy shall be filled by the Chairman of the Stockholders' meeting.

## ARTICLE IX

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### Regulations for the Transaction of Business

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SECTION 1. All money of the Company, or under its charge, deposited in any bank, shall be deposited therein to the credit of the Company in its corporate name.

SEC. 2. No loan on bond and mortgage shall be made without the approbation and concurrence of the President or his authorized substitute and the Executive Committee.



SEC. 3. The seal of the Company may be in duplicate, one of the duplicates to be kept at the main office and the other at the down town office of the Company. The seal shall be in the custody of the Secretary or the Treasurer, the Assistant Secretary or the Assistant Treasurer, and may be attested by any one of such officers. It shall be affixed to all instruments requiring a seal upon the direction of the Board of Directors, the Executive Committee or the President or his authorized substitute.

Report shall be made by the President at the next meeting of the Executive Committee of all cases in which the seal has been affixed under his direction.

SEC. 4. Certificates for money received in trust, specifying the duration and terms of the trust, shall be issued, when required by the persons creating the trust: but in such cases the money received shall, when due, be payable only on the production of the original certificate, or its substitute, if the original be lost or destroyed. All certificates of trust or deposit previous to their being issued, shall be registered in a certificate book, to be kept for that purpose; and to this end proper certificate books shall be prepared with sufficient margin, in which each certificate shall be numbered, registered and described; and all certificates, when paid in full, shall be cancelled, defaced, and filed away.

SEC. 5. All certificates of stock of the Company shall be signed by the President or one of the Vice-Presidents and by the Secretary, or, Treasurer, and shall bear the corporate seal. Transfers shall be made on the books of the Company only by the stockholder or his duly authorized attorney.

SEC. 6. All checks and drafts of the Company

shall be signed by the President or one of the Vice-Presidents and countersigned by either the Secretary, Treasurer, Assistant Secretary or Assistant Treasurer, and checks, drafts and notes payable to the order of the Company must be endorsed by the President or one of the Vice-Presidents, except such as are deposited in bank to the credit of the Company, which may be endorsed in such manner as shall be directed by the President.

## ARTICLE X

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### Order of Business

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SECTION 1. At all regular meetings of the Board of Directors the following shall be the order of business:

1. Reading of the minutes of the last regular meeting, and of any special meeting held since the minutes were last read, unless dispensed with by vote.
2. Reading the minutes of the meetings of the Executive Committee that have taken place since the last meeting of the Board.
3. Report of the President.
4. Report of the Secretary.
5. Reports of Committees.
6. Unfinished business.
7. Miscellaneous business.

## ARTICLE XI

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### Amendments

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SECTION 1. These by-laws may be amended at any regular or special meeting of the Directors, provided that no amendment shall be made except of Section 1,

Article 1, unless written notice specifying the nature of such amendment shall have been sent to each of the Directors at least five days previous to such meeting.

By-Laws of the Mississippi Valley Trust Company,  
of St. Louis, Mo.

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ARTICLE I

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Stockholders Meetings

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SECTION 1. The annual meeting of the stockholders of this Company for the election of Directors and the transaction of other business shall be held at the office of the Company in the City of St. Louis, State of Missouri, on the first Monday of February in each year, and shall be convened by the President and Secretary at the hour of nine o'clock a. m. and continue at least three hours, unless all stock issued and outstanding shall, within that period, have been voted for the election of Directors, and upon any proposition presented to said meeting. At each annual meeting the stockholders attending in person or by proxy in writing shall elect by ballot, Directors for the term of three years to succeed the class of Directors then retiring.

SEC. 2. Notice of the place, hour and objects of each annual meeting of stockholders shall be given by the President and Secretary by publishing the same in a daily newspaper published in the City of St. Louis, Missouri, daily for two weeks next preceding the day of the meeting, unless longer notice is required by law for such meeting on account of the business to be transacted thereat, and then for such time as by law required. A copy of said notice shall also be mailed to each stock-

holder at his last known business address, postage prepaid, at least one week before the date of said meeting.

SEC. 3. If the annual meeting should not, for any reason, be held on the day appointed therefor, it shall be the duty of the Board of Directors to notify and cause such meeting to be held within sixty days after the day so appointed, and of the President and Secretary to give notice thereof as above provided for; and in case of failure by the Directors or by the President and Secretary, respectively, so to do, any five stockholders may give or cause said notices to be given and said meeting to be held. No person shall be admitted to vote at any annual meeting held as in this section provided for, except those who would have been entitled had such annual meeting taken place on the day when it ought to have been held.

SEC. 4. Special meetings of the stockholders may be called by the President at any time, and shall be called by him whenever so directed by resolution of the Board of Directors, or whenever stockholders holding twenty (20) per centum in amount of the capital stock issued and outstanding request him in writing so to do. Notice of the place, hour and objects of every special meeting shall be given by the President and Secretary by publication thereof in the manner above provided for notice of annual meetings, unless a longer notice therefor is by law required; and a copy of such notice shall also be mailed to each stockholder at his last known business address, postage prepaid, at least one week before the day of such meeting.

SEC. 5. The stockholders present in person or by proxy, at any stockholders' meeting, being not less than five (5) persons and representing not less than a ma-

majority of all the shares of stock, shall constitute a quorum for the transaction of business; any stockholders' meeting may adjourn from time to time, until its business is completed. The stockholders present at any meeting, though less than a quorum, may adjourn to a future time, but no business shall be transacted at any adjourned meeting which would not have been in order at the original meeting.

SEC. 6. Each share of stock shall entitle its owner to one vote, and in case of election for Directors, each shareholder shall have the right to cast as many votes in the aggregate as shall equal the number of shares held by him or her, multiplied by the number of Directors to be elected, and may cast the whole number of votes in person or by proxy, for one candidate, or distribute them among two or more.

SEC. 7. At every stockholders' meeting votes may be cast in person or by proxy in writing; and said proxies shall be filed with the inspectors of election and by them deposited with the Secretary of the Company after the votes have been counted; and at every stockholders' meeting a vote by stock shall be taken upon any proposition which may come before the meeting, whenever demanded by any stockholder.

SEC. 8. If the object of any meeting of stockholders be to elect Directors or to take a vote of the stockholders of this Company on any proposition in the notice of such meeting, the President shall, before such meeting, appoint not less than two shareholders, who are not Directors, as inspectors to receive and canvass the votes given at such meeting and certify the result to him as by law required.

## ARTICLE II

### Directors

SECTION 1. The affairs of this Company shall be controlled and managed by a Board of twenty-five Directors, which shall be divided into two classes of eight members each, and one of nine members; the members of one of these classes shall be elected by the stockholders by ballot at the annual stockholders' meeting in February, for a term of three years, and until their successors shall be elected, and the members of one class each succeeding year thereafter.

SEC. 2. Each vacancy in the Board of Directors may be filled by the survivors until the next election of the class to which the outgoing Director belonged.

SEC. 3. Regular meetings of the Board of Directors shall be held at the office of the Company in the City of St. Louis, Missouri, in the second week of each month and at such time as it may from time to time determine, and a majority of the members of the Board shall constitute a quorum for the transaction of business, but a less number may adjourn to another date, if a quorum be not present.

SEC. 4. At all regular meetings of the Board of Directors the following shall be the order of business, unless otherwise ordered by two-thirds of the Directors present:

1. Calling the roll.
2. Reading minutes of all Board meetings not previously read and approved by the Board.
3. Reading minutes of Executive Committee meetings held since the minutes of the Board were last read.
4. Reading minutes of stockholders' meetings.
5. Reports of officers.



6. Reports of committees.
7. Unfinished business.
8. New business.

SEC. 5. Special meetings of the Board of Directors shall be held within two weeks after every stockholders' meeting, unless a regular meeting of the Board is to be held within that time, and may be held at any time on the call of the Chairman of the Board or the President, or of any five (5) Directors.

SEC. 6. Notices of regular meetings of the Board of Directors shall be given by the Secretary by mailing a written or printed notice of the same to each Director, specifying the time and place of meeting and addressed to him at his last known business address, postage prepaid, not less than twenty-four hours before the hour of meeting. Notices of special meeting shall be in writing, briefly indicating the purpose for which they are called, and be delivered at the place of business of each director at least one hour before the hour of meeting.

SEC. 7. The Board of Directors shall have the control and management of the affairs, business and property of the company; elect its officers by ballot; appoint committees, and prescribe the duties of officers and committees when not defined in these by-laws; fix compensation of officers and employes, or prescribe how the same shall be fixed. They shall have full statements of the condition of the affairs of the Company made out and exhibited to the stockholders at least once in each year.

SEC. 8. General rules and regulations for the conduct of the business of the Company shall be made by the Board of Directors, and altered or changed by them from time to time, as circumstances may require.

SEC. 9. Members of the Board of Directors, of the Executive Committee, and the Committee on Trust Estates, or members of any Special Committee that may be appointed, shall receive such compensation for attendance at meetings as the Board of Directors may determine.

## ARTICLE III

### Executive Committee

SECTION 1. An Executive Committee, consisting of the Chairman of the Board, the President, Vice-Presidents, and five (5) other members of the Board of Directors, shall be elected by said Board, by ballot, which shall exercise all the powers of the Board it can lawfully exercise during the intervals between Board meetings, superintend and advise all investments that shall be made of the funds of the Company, and perform such special duties and exercise such special powers as the Board of Directors may, from time to time, by resolution direct and authorize. In the event of the sickness or absence from the city of a member of the committee, the Chairman of the Board or the President may, from time to time, designate any Director to act in the place of the committeeman during such disability.

SEC. 2. The Executive Committee shall meet at the office of the Company at least once in each week, and at such other times as it may determine, or as it may be called to meet by the Chairman of the Board or the President, notices of which shall be given as in the case of the Directors' meetings, unless the committee shall otherwise direct.

SEC. 3. Minutes of the meetings of the Executive Committee shall be recorded in chronological order in the

same minute book of the Company in which the minutes of the meetings of the stockholders and of the Board of Directors are recorded, and shall be read at the next succeeding meeting of the Board of Directors as the report of that Committee to the Board, together with any special report that said Committee may wish to make to the Board, not contained in said minutes.

### ARTICLE III-a

#### COMMITTEE ON TRUST ESTATES

SECTION 1. A Committee on Trust Estates, consisting of the Chairman of the Board, the President, and five members (who may or may not be Directors), shall be elected annually by the Board of Directors by ballot; and, subject to the control of the said Board and the Executive Committee, shall have general supervision of the Trust Department, including specially the management of trust estates, the investment of all trust funds and the disposition of all trust assets.

SEC. 2. In the event of the sickness or absence from the city of a member of the Committee, the Chairman of the Board or the President may, from time to time, designate any director to act in the place of the Committeeman during such disability. Vacancies in the Committee shall be filled by the Board of Directors. The number of members in the Committee may be increased or decreased at any time by the Board of Directors.

SEC. 3. The Committee on Trust Estates shall meet at the office of the Company at least once in each week, and at such other times as it may determine, or as it may be called to meet by the Chairman of the Board or the President, notice of which shall be given as in the case of Directors' meetings, unless the Committee shall otherwise direct.

SEC. 4. Minutes of the meetings of the Committee on Trust Estates shall be recorded in chronological order in a book kept for that purpose in the Trust Department, and shall be submitted to each regular meeting of the Board of Directors.

## ARTICLE IV

### OFFICERS

SECTION 1. The officers shall be a Chairman of the Board, a President, two or more Vice-Presidents, who shall continue in office for one year and until their successors shall be elected, qualified and enter upon the discharge of their duties; a Secretary, one or more Assistant Secretaries; a Trust Officer, one or more Assistant Trust Officers; a Bond Officer, one or more Assistant Bond Officers; a Real Estate Officer, one or more Assistant Real Estate Officers; a Safe Deposit Officer, one or more Assistant Safe Deposit Officers; and one or more Counsel, who shall be elected by the Board, and such other officers and agents as may be determined by the Board of Directors, or other competent authority under its direction, who shall be elected or appointed as the Board of Directors may, from time to time, prescribe. None of the officers, with the exception of the Chairman of the Board and the President, need be members of the Board of Directors, and the respective Vice-Presidents and assistants to the several officers shall have precedence in the order in which they are elected at the annual or other meetings.

SEC. 2. All officers, except the Chairman of the Board, the President and the Vice-Presidents and Counsel, shall give such bond in such amounts, with such security, and approved in such manner as the Board of

Directors may, from time to time, direct; and all officers, agents and employes, except the Chairman of the Board, the President and Vice-Presidents, shall hold their offices at the pleasure of the Board of Directors.

SEC. 3. The Chairman of the Board shall preside at all meetings of the Board of Directors and of the Executive Committee, and shall have all the powers of the President, whether the President be absent or present.

SEC. 3a. In the absence of the Chairman of the Board, the President shall preside at all meetings of the Board of Directors and of the Executive Committee. The President shall superintend and conduct the business of the Company, subject to the control of the Chairman of the Board and the Board of Directors. He shall be a member of all standing and other committees appointed by the Board of Directors, unless excused by the Board from being a member thereof. He shall, when authorized by resolution of the Board of Directors, affix the seal of the Company to any conveyance of, or contract for, or in relation to lands to which the Company is a party, and all such instruments shall be signed and acknowledged by him on behalf of the Company. He is also authorized and empowered for the Company as principal or co-principal, or surety or co-surety, to execute any and all guarantees, specialties and bonds to the United States, or to any State or Municipality, or to any corporation or individual, and to cause the seal of the company to be affixed thereto, and in behalf of the Company to acknowledge and deliver the same. The President is also authorized to affix said seal to and execute on behalf of the Company any and all deeds or other instruments relating to or connected

with any and all trusts accepted by the Company, also any and all contracts, acknowledgments of satisfaction of mortgages and judgments, certificates of trust, releases, or other instruments issued by the Company in the transaction of its business. He is also authorized to transfer to the parties lawfully entitled thereto any stocks which may stand in the name of the Company on the books of such other company. He shall have power to suspend any officers or heads of departments until the Board can be convened, and to dismiss any of the subordinate employes when he shall deem proper, and shall perform such other duties and exercise such other powers as the Board of Directors may, from time to time, prescribe.

SEC. 4. The several Vice-Presidents, whether the President be absent or present, but subject to the control of the President and others having precedence in their order, shall have and exercise all the rights, powers and duties of the President, and the signature and acknowledgment of the Vice-Presidents to all official acts of the Company shall be valid and sufficient, and they shall perform such other duties and exercise such other powers as the Board of Directors may, from time to time, prescribe, or as may be delegated to them by the President as and when authorized by said Board.

SEC. 5. The Secretary, subject to the control of the President and others having precedence in their order, shall receive and take care of all moneys, securities and evidences of indebtedness belonging to the Company, depositing the same as the Board of Directors may direct, keep full and complete accounts of all receipts and disbursements, and make report thereof to the Board of Directors as often as required, and per-



form such other duties as the Board may direct. He shall have authority to sign checks, drafts, bills of exchange and certificates of deposit, endorse checks or drafts payable to the Company, and sign other papers in the routine business of the Company.

SEC. 6. The Secretary shall have custody of the seal of the Company, and attest the same when lawfully affixed to any instrument. He shall attend and keep the minutes of all meetings of stockholders, Board of Directors and Executive Committee, give notice of all Directors and stockholders' meetings, have general control and custody of the books, papers and records of the Company. He shall daily examine, take charge of and see to the deposit of the cash in the respective departments, and at each monthly meeting of the Board of Directors shall furnish a correct general statement of the affairs of the Company during the preceding month. It shall be his duty to observe carefully the conduct of all persons employed by the Company and to report to the President all such instances of neglect or unfitness as may come to his knowledge; and under the direction of the President, Board of Directors and Executive Committee, respectively, shall perform such other duties pertinent to his office, as they may require.

SEC. 7. The Assistant Secretaries, subject to the control of the Secretary and others having precedence in their order, shall have and exercise all the rights, powers and duties of the Secretary, whether the Secretary be absent or present, and in the actual performance of his duties; shall assist the Secretary and shall perform such duties as may be assigned to them by the Secretary or other officers of the Company.

SEC. 8. The Trust Officer, subject to the control

of the President and others having precedence in their order, shall have charge of the trust department, and may represent the Company in any of the business of said department. He shall have charge of all the securities and funds held in trust by the Company, and shall keep the securities and accounts of each trust separate and apart from those of every other trust, and entirely apart from the assets of the Company. He shall have authority to make such receipts, agreements, affidavits and settlements as may be requisite to be made in the trust department. He shall have authority to sign checks against trust balances, such checks to be countersigned by one of the Assistant Trust Officers, or by the President, a Vice-President, Secretary or an Assistant Secretary of the Company. He may countersign checks of principals on bonds where this Company is surety, and may perform such other duties and exercise such other powers as may be delegated to him by the President or a Vice-President of the Company.

SEC. 9. The Assistant Trust Officers, subject to the control of the Trust Officer and others having precedence in their order, shall have and exercise all the rights, powers and duties of the Trust Officer, whether the Trust Officer be absent or present, and in the actual performance of his duties; shall assist the Trust Officer and shall perform such duties as may be assigned to them by the Trust Officer or other officers of the Company.

SEC. 10. The Bond Officer, subject to the control of the President and others having precedence in their order, shall have charge of the bond department, and may represent the Company in any of the business of said department. He shall, at the end of each day, ac-

count to the proper department for the receipts and disbursements of his department, and also for all securities handled.

SEC. 10a. The Assistant Bond Officers, subject to the control of the Bond Officer and others having precedence in their order, shall have and exercise all the rights, powers and duties of the Bond Officer, whether the Bond Officer be absent or present and in the actual performance of his duties; shall assist the Bond Officer and shall perform such duties as may be assigned to them by the Bond Officer or other officers of the Company.

SEC. 11. The Real Estate Officer, subject to the control of the President and others having precedence in their order, shall have charge of the real estate department and may represent the Company in any of the business of said department. He shall promptly deposit in the financial department any funds received in the course of business.

SEC. 11a. The Assistant Real Estate Officers, subject to the control of the Real Estate Officer and others having precedence in their order, shall have and exercise all the rights, powers and duties of the Real Estate Officer, whether the Real Estate Officer be absent or present and in the actual performance of his duties; shall assist the Real Estate Officer and shall perform such duties as may be assigned to them by the Real Estate Officer or other officers of the Company.

SEC. 12. The Safe Deposit Officer, subject to the control of the President and others having precedence in their order, shall have charge of the safe deposit and storage vaults, and may represent the Company in any of the business of the safe deposit department. He

shall promptly deposit in the financial department any funds received in the course of business.

SEC. 12a. The Assistant Safe Deposit Officers, subject to the control of the Safe Deposit Officer and others having precedence in their order, shall have and exercise all the rights, powers and duties of the Safe Deposit Officer whether the Safe Deposit Officer be absent or present and in the actual performance of his duties; shall assist the Safe Deposit Officer and shall perform such duties as may be assigned to them by the Safe Deposit Officer or other officers of the Company.

SEC. 13. The Counsel of the Company shall have charge of its legal business, shall appear for the Company in all suits and proceedings to which it is a party, and shall advise the Board of Directors, Executive Committee, President and Secretary, concerning the affairs of the Company when by them respectively requested.

## ARTICLE V

### STOCK

SECTION 1. The Capital Stock of this Company shall be represented by certificates signed by the President, or by some other executive officer of the Company, when directed by the Board of Directors, and attested by the Secretary, with the corporate seal attached, and shall be transferable only on the books of the Company in person or by attorneys duly authorized according to law, which fact shall be stated on the face of the certificate; and when the stock is transferred, the certificate thereof shall be returned to the Company and cancelled and new certificates issued.

SEC. 2. Until stock shall be transferred as pro-

vided in Section 1 of this article, no person shall be recognized by this Company as the owner of said stock, except the person to whom the same was issued, and in whose name the same stands on the books of the Company, except as provided by law in case of executor, administrator, guardian or trustee.

SEC. 3. The transfer books shall be closed ten days previous to each annual election of the Directors, and for ten days immediately preceding the date of payment of a dividend; and no person shall receive payment of dividends except those in whose names said stock stood on the books of the company on the date the transfer books shall be so closed.

SEC. 4. In case a stockholder shall apply for a renewal of a lost certificate of the capital stock of the Company, he shall fully state in writing the grounds of such application, and shall give four weeks notice of such application by advertising the same twice a week in one or more of the daily newspapers published in the City of St. Louis, Missouri, and elsewhere, if directed by the officers of the Company; and if no adverse claimant to said stock appear within ten days after the last publication of such notice, a new certificate may be issued to replace the old one, provided due proof of such publication of said notice be deposited with the Company, and a bond of indemnity in double the value of said stock be given to the Company, with security, to be approved by the President and Secretary or by the Executive Committee or by the Board of Directors.

SEC. 5. Every certificate of its stock issued by this Company shall state, either on its face or by endorsement thereon, the amount or percentage actually paid on the shares of stock represented thereby. All amounts unpaid on each share of stock subscribed for or for

which a certificate has been issued by this Company shall be subject to call by resolution of the Board of Directors making assessments thereon and therefor, which assessments shall not be greater than twenty-five nor less than five per centum of the full face value of the stock at any one time, nor be made payable within any shorter period than five days from the date of mailing the notice of such assessments. Such resolution shall specify the amount of the assessment, and when the same is payable; and if such amount be not paid at the time and place required by said assessment resolution and the notice thereof, the Board of Directors may forfeit the stock of any such delinquent stockholder, and all previous payments made thereon to the use of the Company as prescribed by law. Before any stock shall be so forfeited the Board of Directors shall cause notice in writing to be served on such delinquent stockholder personally, or by depositing the same in the postoffice at the City of St. Louis, Missouri, postage prepaid, properly directed to such stockholder at the postoffice nearest his usual place of residence, which notice shall state that he is required to make payment of the amount specified in such assessment resolution, or such part thereof as remains unpaid, at the office of the Company, in the City of St. Louis, on a day to be specified in said notice, which shall be not less than sixty-one days after the date of said notice, and that if he fails to make such payment at said time and place, his stock and all previous payments thereon will be forfeited for the use of the Company.

## ARTICLE VI

### MISCELLANEOUS

SECTION 1. The fiscal year of this Company shall end on the thirty-first (31st) day of December in each



year, and at the close of each fiscal year it shall be the duty of the Board of Directors to cause a complete and accurate statement of the financial condition of the Company to be made forthwith from the books thereof, a copy of which shall be submitted to the stockholders at the annual meeting.

SEC. 2. All money of the Company, or under its charge, deposited in any other trust company or bank, shall be deposited therein to the credit of the Company by its corporate name.

SEC. 3. All trust funds in the hands of the Company, until invested, shall be kept in the name of the Company as trustee for the trust estate, and when invested shall be invested in the name of the Company as such trustee; and all securities and accounts of such trusts shall be kept separate from those of the Company, and apart from those of every other trust.

SEC. 4. There shall be semi-annual examinations of all the books, accounts and securities of the company to be made by a committee of three persons, who shall be stockholders of the Company, to be appointed by the Board of Directors for that purpose, who shall report the results of such examination to the Board at its next regular meeting.

SEC. 5. No Director, officer or employe shall be allowed to disclose any of the business of the Company, or of any of its customers, that is not of a public nature, or duly required by legal authority, except the necessary information to customers concerning their own particular business.

SEC. 6. The seal of the Company shall be a circular disk one and seven-eighths inches in diameter, having upon its face in circular form the words com-

posing the corporate name of the Company, and the words "St. Louis, Missouri," and the date of incorporation in circular form within the circle formed by the name, and with the word "Seal" in a straight line in the center of the face.

SEC. 7. The office of the Company shall be open for the transaction of business from ten (10) o'clock a. m. to three (3) o'clock p. m. daily, except on Sundays and legal holidays; but the Board of Directors may, in its discretion, change said hours, or close the office entirely whenever the interests of the Company will be the best subserved thereby, or circumstances shall render the same proper.

SEC. 8. These By-Laws may be added to, repealed, altered or changed, or other By-Laws substituted therefor in whole or in part, at any annual meeting of the stockholders, without previous notice, provided two-thirds of all the stock of the Company then outstanding shall be present in person or by proxy at such meeting; or at any annual or special meeting of the stockholders at which a majority of all the stock shall be represented in person or by proxy, provided the notice calling said meeting shall specify that a proposition to change the By-Laws will be voted upon thereat. An affirmative majority of the stock represented in person or by proxy at any meeting shall be necessary to adopt such change.

Resolution Creating the Foundation Adopted by the  
Board of Directors of the Cleveland Trust  
Company, January 2, 1914

With a view to securing greater uniformity of purpose, powers and duties of administration in the management and control of property given, devised and bequeathed for charitable purposes, the Board of Directors of the Cleveland Trust Company agrees to accept of such gifts, devises and bequests as Trustee for the uses, purposes and with the powers and duties hereinafter set forth, all property so held to be known as constituting THE CLEVELAND FOUNDATION, and to be administered, managed and dealt with, save as hereinafter provided, as a single trust. From the time the donor or testator provides that income shall be available for use of such Foundation, such income, less proper charges and expenses, shall be annually devoted perpetually to charitable purposes, unless principal is distributed as hereinafter provided. Without limiting in any way the charitable purposes for which such income may be used, it shall be available for assisting charitable and educational institutions whether supported by private donations or public taxation, for promoting education, scientific research, for care of the sick, aged or helpless, to improve living conditions or to provide recreation for all classes, and for such other charitable purposes as will best make for the mental, moral and physical im-

provement of the inhabitants of the City of Cleveland as now or hereafter constituted, regardless of race, color or creed, according to the discretion of a majority in number of a committee to be constituted as hereinafter provided, or in event of the failure of two of the public officials empowered to appoint members upon the committee to make such appointments within thirty days from the time they are requested in writing by the Trustee to do so, or in event of the unwillingness, failure or inability of a majority of the members to serve if appointed, or of the power to disburse income by said committee being adjudged by a court of last resort to be illegal, then according to the unfettered discretion of a majority of the members of the Board of Directors of the Cleveland Trust Company, such committee, or the directors of the Cleveland Trust Company in event the power shall lodge in them, to use or distribute the net income when and as above provided, in such manner as will best accomplish the purpose expressed, according to their absolute discretion; provided that, if contributors to the Foundation, in the instruments creating their trusts, indicate their desire:

1. As to time when and purposes for which principal contributed by them shall be distributed.

2. As to purposes for which their income shall be used, either for a definite or indefinite period of time.

3. That the power to distribute principal or income shall be vested in the Committee constituted as hereinafter provided, with the exception only that the member provided to be selected by the Judge of the United States District Court shall be appointed by the Board of Directors of the Cleveland Trust Company.

The Trustee shall respect and be governed by the

wishes as so expressed, but only in so far as the purposes indicated shall seem to the Trustee, under conditions as they may hereafter exist, wise and most widely beneficial, absolute discretion being vested in a majority of the then members of the Board of Directors of the Cleveland Trust Company to determine with respect thereto. Principal or interest diverted under this power to other than the specific purposes indicated shall be used and distributed for the general purpose of the Foundation.

The committee to distribute said income shall be residents of Cleveland, men or women interested in welfare work, possessing a knowledge of the civic, educational, physical and moral needs of the community, preferably but one, and in no event to exceed two members of said committee to belong to the same religious sect or denomination; those holding or seeking political office to be disqualified from serving. Said committee shall be selected as follows:

Two by the directors of the Cleveland Trust Company, preferably to be designated from their own number.

One by the Mayor or chief executive officer of the City of Cleveland.

One by the senior or presiding Judge of the Court for the time being having jurisdiction of the settlement of estates in Cuyahoga County.

One by the senior or presiding Judge of the United States District Court for the Northern District of Ohio, or of the Court that may hereafter exercise the jurisdiction of said Court in Cuyahoga County.

In event of any question arising as to the official herein authorized to make said appointments, the deci-

sion of the Board of Directors of the Cleveland Trust Company shall be final and conclusive with respect thereto; all appointments to be for a term of five years, except the appointments first made, which shall be as follows:

One member by the Board of Directors of the Cleveland Trust Company for one year.

One member by the Judge of the United States District Court for the Northern District of Ohio for two years.

One member by the Judge of the Probate Court of Cuyahoga County for three years.

One member by the Mayor of the City of Cleveland for four years.

One member by the Board of Directors of the Cleveland Trust Company for five years.

Vacancies by expiration, death, resignation or refusal to serve to be filled for the unexpired term by authority making original appointment, in event of the failure for thirty days after receipt of written notice from the Trustee so to do, then by the Directors of the Cleveland Trust Company; the expenses of the committee, including compensation, to be fixed by the Trustee to a secretary, who shall be appointed by and hold office subject to the will of the Trustee, shall be paid out of the income, but the members shall serve without compensation. They shall annually organize by the election of a chairman and shall keep complete records of their proceedings, receipts and disbursements, copies of which shall be filed with the Trustee on or before the 20th day of January in each year; disbursements shall be made by the Trustee on the written orders of a majority of the committee given at regularly called meet-



ings. Failure of the committee for twelve months to file disbursement orders with the Trustee shall empower the Board of Directors of the Cleveland Trust Company to disburse income then available for distribution.

After the entire income of any trust constituting the Foundation is available for charitable purposes, all or any portion of the property belonging to such trust may be listed for taxation, regardless of any statute exempting all or any part thereof by reason of its application to charitable purposes, if a majority of the Board of Directors of the Cleveland Trust Company shall so direct. The receipts and disbursements of the committee as well as of the Trustee shall be annually audited by an independent Auditor, and there shall be published annually in the two newspapers published in the City of Cleveland reputed to have the largest circulation therein, a certified statement by such Auditor showing in detail the investments held in each separate trust constituting the Foundation, the amount of income received during the preceding year, the purpose for which the income has been used, and a classified statement of the expenses of the committee and the Trustee. Failure to make such publication shall authorize any court of competent jurisdiction to appoint another trustee in event the court shall find that neglect to make such publication is due to gross carelessness or willful neglect of the Trustee.

Successor trustees, however, or for whatever reason appointed or created, shall have all powers and discretions and be charged with like duties in all respects as herein conferred upon the Cleveland Trust Company.

With the approval of two-thirds of the entire Board of Directors of the Cleveland Trust Company, given at a meeting called specifically for that purpose, all or any

part of the principal constituting the trust estate may be used for any purpose within the scope of the Foundation, which may have the approval of four members of said committee, providing that not to exceed twenty (20) per cent of the entire amount held as principal shall be disbursed during a period of five consecutive years. In event a court of last resort shall ever adjudge that the provisions requiring the approval of said committee to disbursement of principal, or that the power conferred on said committee to disburse income is invalid, the power to distribute principal and income shall be vested exclusively in the Board of Directors of the Cleveland Trust Company, and thereafter said committee shall act in an advisory capacity only.

To further assure the carrying out of the purposes of the Foundation, each and every of its provisions are to be regarded and construed as independent of every other provision. In event a court of last resort shall adjudge that any of the terms, conditions or provisions of the Foundation are invalid, such adjudication shall in no wise affect the validity of the remaining provisions, and the Directors of the Cleveland Trust Company, by a two-thirds vote of the entire Board at a meeting called specially for that purpose, are empowered to direct that the administration of the trust be proceeded with in such manner as will most nearly conform in their judgment to the charitable intention and purposes of the Foundation, due consideration being given to changed conditions and varying circumstances.

Either the attorney-general of the State of Ohio, or the law officer of the City of Cleveland, shall have the right to institute appropriate proceedings in any court of competent jurisdiction to restrain, correct or recover

for any maladministration of the trust estate by Trustee or the Committee, and shall at all reasonable times have the right to inspect the books, vouchers and records of the Trustee and the Committee in any way pertaining to the Foundation.

In administering the property constituting such Foundation, unless otherwise specifically provided in the instrument creating the trust, the Trustee shall have power to sell, lease, transfer or exchange all or any part of said property at such prices and upon such terms and conditions and in such manner as it may deem best; to execute and deliver any proxies, powers of attorney or agreements that it may deem necessary or proper; to invest and re-invest in such loans, securities or real estate as it may deem suitable for the investment of trust funds, irrespective of any statutes or rules or practices of Chancery Courts now or hereafter in force limiting the investments of trust companies or trustees generally; to determine whether money or property coming into its possession shall be treated as principal or income and charge or apportion any expenses or losses to principal or income according as it may deem just and equitable; to select and employ in and about the execution of the trust, suitable agents and attorneys and to pay their reasonable compensation and expenses; the Trustee in no event to be held liable for any neglect, omission or wrongdoing of such agents or attorneys, provided reasonable care shall have been exercised in their selection. The Trustee, save for its own gross neglect or willful default, shall not be liable for any loss or damage.

#### FORM OF BEQUEST

If your will or trust agreement provides for payment of income to family and relatives during life, the

insertion of the following will result in a contribution to the Cleveland Foundation with the same effect as if the entire plan were incorporated:

“Upon the termination of the trusts hereinbefore expressed, I direct that the entire net income derived from the trust estate, with its accumulations as aforesaid, shall be annually expended or appropriated, perpetually, until the principal may have been disbursed, for the charitable uses and purposes set forth in a Resolution adopted by the Board of Directors of the Cleveland Trust Company on the second day of January, 1914, providing for a community charitable trust, designated in said Resolution as THE CLEVELAND FOUNDATION. I further direct that the trust estate, both principal and income, shall thereafter vest in the Cleveland Trust Company and be managed, controlled, administered and disbursed in all respects as provided in said Resolution, reference to which is hereby made, as fully and with like effect as if herein set forth at length.”

**Resolution Adopted by the Board of Directors of the  
Security Trust & Savings Bank, Los Angeles,  
June 1, 1915**

WHEREAS, It is desirous of securing greater efficiency of administration in the management, disposition and control of the income and principal of property given, devised and bequeathed for charitable purposes and uses,

The Board of Directors of the Security Trust and Savings Bank, hereinafter called Trustee, on behalf of said Trustee, does hereby agree that the Trustee shall accept, take and hold as Trustee, all property transferred, given, conveyed, devised or bequeathed to it for charitable uses and purposes, and with the powers and

duties hereinafter set forth, all property so taken and held to constitute and be known as the LOS ANGELES COMMUNITY FOUNDATION, hereinafter called "Community Foundation," and to be administered, managed and disposed of, either or both as to principal and income, as a whole and as a single trust, except as hereinafter mentioned; provided, however, that said Trustee reserves the absolute right to refuse to accept or take any property so transferred, given, conveyed, devised or bequeathed to it, which in its discretion will not be properly available for or best serve the purposes of this trust. Nothing, however, in this instrument contained shall be construed to limit the powers of the Trustee to take and accept property and to hold and to exercise the powers herein described with reference to any property that may be transferred or set apart to said Community Foundation, by the Security Trust and Savings Bank from other sources, or by persons other than the original donor or trustor of any other trust. From and after the time when income from such Community Foundation shall be available for the use of such Community Foundation, such income, less proper charges and expenses, shall be applied and devoted annually (or at such shorter intervals as the Trustee may see fit), and perpetually, to uses and purposes strictly charitable or eleemosynary in nature according to the laws of the State of California in force at the time, unless and until the whole or a part of the principal is distributed for uses and purposes strictly charitable or eleemosynary in nature according to the laws of the State of California in force at the time in the manner hereinafter provided. Without limiting in any manner the strictly charitable or eleemosynary purposes for which such income may be used and ap-

plied, it shall be available to the Trustee for assisting strictly charitable or eleemosynary institutions whether supported by private donations or public taxation, or both, and whether situated within or without the City of Los Angeles, for bringing the hearts and minds of persons under the influence of education, for relieving their bodies of disease, suffering or constraint, for assisting to establish themselves for life, for erecting or maintaining public buildings or works or in other ways (strictly charitable or eleemosynary) lessening the burdens or making better the condition of the general public or some class or classes thereof; provided that the class or classes so benefited shall be some portion or all of the people of the City of Los Angeles, or the County of Los Angeles as now constituted, or of the municipalities within said county or any or all of them.

Said income may be so used, applied and availed of by the Trustee for the charitable uses and purposes aforesaid according to the discretion and decision of a majority in number of an advisory committee to be constituted as hereinafter provided, or in the event that for any reason said advisory committee should cease to exist, or the directions for the application of said income as herein provided of a majority in number of said committee, shall not be obtained, or in the event of the power to disburse said income by said advisory committee being adjudged by a final judgment of a court of competent jurisdiction of the State of California to be illegal, then according to the uncontrolled and absolute discretion of the Trustee, to be exercised by the Trustee through motion, vote, order or resolution of a majority of its Board of Directors from time to time, such advisory committee or said Trustee, in the event the power shall lodge in



them or it, to use, apply or dispose of the net income when and as above provided, in such manner as will best accomplish the uses and purposes herein expressed according to their or its absolute and sole discretion; provided, however, that if the contributors to the Community Foundation in the instruments creating their trusts or making their gifts, devises or bequests thereto, shall indicate their desire:

(a) As to time when, the charitable purposes for which, and amount of, the principal contributed by them shall be applied or distributed; or/and

(b) As to the charitable purposes and period of time for which the income shall be applied or distributed; or/and

(c) That the power to apply and distribute principal or income, or both, shall be vested in the advisory committee constituted as herein provided.

The Trustee shall respect and be governed by the wishes as so expressed, but only in so far as the charitable purposes indicated shall seem to the Trustee under conditions as they may hereafter exist from time to time, wise and most widely beneficial; sole, absolute and uncontrolled discretion being hereby vested in the Trustee to determine with respect thereto, such discretion to be exercised by the Trustee through motion, vote, order or resolution of a majority of its Board of Directors from time to time. The principal and income diverted under this power to other than the specific purposes indicated in the instrument or instruments of conveyance executed by said contributors, shall always be used and distributed for the charitable objects and purposes of the Community Foundation as herein indicated.

The advisory committee to disburse said income

shall at all times be residents of the County of Los Angeles, men or women interested in the public welfare, possessing a knowledge of the charitable needs of the people of said County as now constituted, or/and of the municipalities within its borders, and not more than two of whom shall at any one time belong to the same religious sect or denomination; those members holding political office to be *ipso facto* disqualified from serving. The first members of said advisory committee shall be selected by the Board of Directors of said Security Trust and Savings Bank, as follows:

Two members shall be selected from amongst the directors of said Board;

The remaining three members shall be selected at large from the residents of said County of Los Angeles.

The term of office of each member shall be for five years, except the appointments first made, which shall be for one, two, three, four and five years; the term of each member to be determined amongst themselves by lot in such manner as they may mutually agree. All vacancies caused by disqualification, death, resignation, expiration of term, or refusal to serve, to be filled by the remaining members of said advisory committee, provided that at all times two of said members shall be directors of said Trustee. In the event of the failure by said committee for thirty days to fill vacancies amongst themselves, the Board of Directors of said Trustee shall be, and it is hereby, vested with the power to do so. The members of said advisory committee shall serve without compensation, but all necessary expenses incurred by them in the performance of their duties, and which may be approved by the Trustee, including the compensation of a secretary who shall be appointed by, hold office sub-

ject to the will of, and whose compensation shall be fixed by the Trustee, shall be paid out of the income derived or received from the trust estate. Said committee shall annually organize and elect from amongst themselves such officers as they deem advisable, who shall serve without compensation, and shall keep complete records of their proceedings, receipts and disbursements, copies of which shall be filed with the Trustee on or before the 15th day of January in each year. All disbursements under this trust shall be made by the Trustee on the written orders of a majority of the advisory committee, given at regularly called meetings thereof.

Failure of the advisory committee to file disbursement orders with the Trustee shall authorize and empower the Trustee to disburse the income then available for distribution for any charitable purposes mentioned in this trust, said authority and power to be exercised by the Trustee through motion, vote, order or resolution of a majority of its Board of Directors from time to time.

A condensed statement of the receipts and disbursements under this trust, in such form as the Trustee shall select, shall be by it published annually in one or more newspapers published in the City of Los Angeles.

With the approval of two-thirds of the entire Board of Directors of the Trustee, given at a meeting called specifically for that purpose, or at any regular meeting after notice in writing given at least five days prior thereto, all or any part of the principal constituting the trust estate may be by the Trustee applied toward, and used for, any purpose within the scope of this trust which may have the approval of four of the members of said advisory committee; provided, however, that in no case shall more than 20 per cent of the entire amount

of the principal of the trust estate be disbursed during a period of any one year.

In the event that a court of competent jurisdiction of the State of California shall ever finally adjudge the provisions requiring the approval or conferring the power on said advisory committee in disbursing either or both the principal or income from the trust estate, to be invalid, the power to disburse such principal and income shall thereafter be vested solely and exclusively in the Trustee, such power and discretion to be exercised by the Trustee through motion, vote, order or resolution of a majority of its Board of Directors from time to time, as to disbursement of income, and vote of two-thirds of the members of said Board as to disbursement of principal, and thereafter said advisory committee shall act in an advisory capacity only.

To further assure the carrying out of the purpose of the Community Foundation, each and every of its provisions shall be regarded and construed as independent of every other provision, and in the event that a court of competent jurisdiction shall finally determine that any of the terms, conditions or provisions hereof are invalid, such determination shall in nowise affect or impair the validity of the remaining provisions, and this trust shall be carried out by the said Trustee so as to conform as nearly to the purpose hereof as shall be possible, and as may be modified by any such judicial determination.

In the event that future or changed conditions, circumstances, laws or judicial decisions shall make it advisable or necessary to abandon or change the mode or plan of administration of this trust, so as to make the same conform to such changed conditions, circum-

stances, laws or decisions, the Trustee shall be, and it is hereby, generally and specifically, authorized and empowered to administer this trust and so carry out the charitable purposes of the Community Foundation in such manner as it shall deem advisable; absolute and uncontrolled discretion being hereby vested in said Trustee for this purpose and end.

The advisory committee shall at all reasonable times have the right to inspect the books, vouchers, records, securities and investments of the Trustee in any way pertaining to the Community Foundation; and the costs, charges and expenses of any such inspection, and of any necessary audit shall be chargeable against the income or principal, or both, of the trust estate. Such advisory committee, as well as the attorney-general of the state, shall have the right to institute proceedings in any court of competent jurisdiction to restrain, correct or recover for maladministration of the trust estate by the Trustee, or of the abuse of the powers of the Trustee.

In the event that said Trustee shall be removed from its office as Trustee hereunder by any court of competent jurisdiction in a proceeding instituted for that purpose by said advisory committee, as above authorized, such court shall appoint a successor of said Trustee, who shall have all powers and discretions, and be charged with like duties in all respects as herein conferred upon the Security Trust and Savings Bank. The Trustee may at any time resign from this trust, by written notice thereof, delivered to the advisory committee six months prior to the time when such resignation shall take effect. In such case the advisory committee shall be, and it is hereby, vested with the power to appoint any reputable corporation in the City of Los Angeles,



which is authorized and legally qualified to execute trusts, as the successor of this trust, which shall be vested with all the powers and discretions and charged with the same duties hereunder as are described herein with reference to said Security Trust and Savings Bank.

And if at any time hereafter, during the continuance of the trust herein created, the corporate charter of the Security Trust and Savings Bank shall terminate, in any manner, or expire by limitation of time, and its corporate existence shall be extended, or a new corporation empowered to act as Trustee shall be organized, pursuant to the then existing law applicable thereto, for the purpose of continuing in whole, or in part, the business thereof, then immediately upon the extension of its corporate existence, or the organization of such new corporation, it shall *ipso facto* be and become, the Trustee of the trust herein created, in place, and instead of such expiring or retiring corporation, and shall be vested and charged with all and the same rights, titles, estates, interests, powers, discretions and duties of such trustee, as herein set out, without the necessity of any further act or conveyance.

Successor trustees, for whatever reason appointed or created, shall have all powers and discretions and be charged with like duties in all respects as herein declared by Security Trust and Savings Bank.

In administering any property constituting such Community Foundation, unless otherwise specifically provided in the particular instrument transferring the particular property to this trust, the Trustee shall be, and it is hereby specifically and generally authorized and empowered:

- (a) To sell, lease, mortgage, transfer or exchange



all or any part of the trust estate at such prices and upon such terms and conditions and in such manner as it may deem best ;

(b) To advance or loan money, upon the approval of the advisory committee, for the purpose of this trust, and have a first and prior lien upon all of the income and principal of the trust estate, with the right to fully repay and reimburse itself, out of either or both said income or said principal for all sums so loaned or advanced; and any equitable title it may take or receive to the income or principal of the trust estate by reason of any such advance or loan shall remain separate and shall not become merged with the legal title which it shall hold as Trustee hereunder ;

(c) To execute and deliver any proxies, powers of attorneys, or to make, execute and deliver any contracts, deeds and all agreements and other instruments that it may deem necessary or proper in the administration of this trust ;

(d) To invest, reinvest, loan and reloan the whole or any portion of the trust estate in such, any and all ways, properties or securities and upon such terms and conditions as it may deem best without restriction to the character or classes of loans or investments permitted to trust companies ;

(e) To determine whether money or property coming into its possession shall be treated as principal or income, and charge or apportion any expenses or losses to principal or income as it may deem just and equitable ;

(f) To select and employ in and about the execution of this trust all employes, agents and attorneys which it may deem necessary, and to pay their reason-

able compensation and expenses; the trustee in no event to be liable for any neglect, omission or wrong-doing of such employes, agents or attorneys, if it shall have exercised reasonable care in their selection;

(g) To do all and any other acts and things not hereinbefore specified which it may deem advisable, or which changed and varying conditions, laws or circumstances may render necessary or advisable, to the end that the purposes of the Community Foundation may be consummated;

(h) To take and retain annually from the gross income received or derived from the trust estate during the life of the trust, a reasonable compensation for acting as Trustee;

(i) To protect the trust and all property of the trust and the Trustee's interest thereto from attack of any kind;

(j) To reimburse itself from the trust estate or from the gross income received or derived therefrom, or both, for all outlays and expenditures made by it in the proper performance of its powers, discretions and duties.

The Trustee, save for its own gross neglect or willful default, shall not be liable or responsible for any loss or damage resulting to the trust estate.

The Trustee may advise with counsel; and the opinion of counsel shall be a full protection and justification to the Trustee for anything suffered or done by it, in good faith and in accordance with such opinion.

#### FORMS OF BEQUEST

FIRST. If a direct devise or bequest by Will for the general purpose of the Foundation is contemplated, use the following form:

“I hereby give, devise and bequeath, in fee simple, to the Security Trust and Savings Bank, a corporation, of Los Angeles, California (here state the sum, share or description of property intended to be given), in trust for the charitable uses and purposes and with the powers and duties, both as to principal and income, as are fully set forth in a Resolution adopted by the Board of Directors of said Security Trust and Savings Bank on the first day of June, 1915, recorded in Book 242, Page 182, of Miscellaneous Records of Los Angeles County, providing for a community charitable trust, designated in said resolution as Los Angeles Community Foundation, which said resolution is incorporated herein by reference, with the same force and effect as if herein set forth at length.”

SECOND. If a direct devise or bequest by Will, with a request for specific application of the income is desired, use the following form:

“I hereby give, devise, and bequeath, in fee simple, to the Security Trust and Savings Bank, a corporation, of Los Angeles, California (here state the sum, share, or description of property intended to be given), in trust for the charitable uses and purposes and with the powers and duties, both as to principal and income, as are fully set forth in a Resolution adopted by the Board of Directors of said Security Trust and Savings Bank, on the first day of June, 1915, recorded in Book 242, Page 182, of Miscellaneous Records of Los Angeles County, providing for a community charitable trust, designated in said resolution as Los Angeles Community Foundation, which said resolution is incorporated herein by reference, with the same force and effect as if herein set forth at length. It is my suggestion, however (without any

intention to make the same binding upon, or controlling, said Trustee), that the said net income shall be applied towards the (maintenance of a bed for tubercular persons in the X Sanatorium of Los Angeles, California—or for some other purpose desired—) for a period of ten years after my demise, or any other time, at which time (one-half of the principal sum herein devised) shall be expended by said Trustee towards the (erection of a fountain in Y Park in said City of Los Angeles for the use of thirsty animals and birds frequenting said park—or any other object desired—) and the remaining one-half of the principal, together with the net income therefrom, to be thereafter expended or appropriated pursuant to said Resolution.”

THIRD. If the devise or bequest is to go to the Foundation, after the termination of a prior life estate for the benefit of some designated person, use the following form:

“The remainder in fee simple of the property hereinbefore devised or bequeathed for life, upon the termination of said life estate, I hereby give, devise and bequeath to the Security Trust and Savings Bank, a corporation, of Los Angeles, California, in trust for the charitable uses and purposes and with the powers and duties both as to principal and income as are fully set forth in a Resolution adopted by the Board of Directors of said Security Trust and Savings Bank, on the first day of June, 1915, recorded in Book 242, Page 182, of Miscellaneous Records of Los Angeles County, providing for a community charitable trust, designated in said resolution as Los Angeles Community Foundation, which said Resolution is incorporated herein by reference, with the same force and effect as if herein set forth at length.”

Permanent Charity Fund Boston Safe Deposit and  
Trust Company, Trustee

SEPTEMBER 7, 1915

I, Herbert D. Heathfield, Secretary of Boston Safe Deposit and Trust Company, hereby certify that, at a regular meeting of Boston Safe Deposit and Trust Company, held August 3, 1915, a quorum being present, the following vote was passed:

VOTED: That the President and the Treasurer, or Assistant Treasurer, be and they hereby are authorized to execute and, either one or both, to acknowledge and to record, in the name and on behalf of this Company, an Agreement and Declaration of Trust for charitable objects and purposes in substantially the form of that presented to this meeting, and filed with the records thereof; the exact form of such instrument shall be finally determined by the President and shall be that which by his execution thereof he shall determine.

A true copy from the records.

Attest:

HERBERT D. HEATHFIELD,

September 7, 1915.

*Secretary.*

[CORPORATE SEAL OF BOSTON SAFE DEPOSIT AND TRUST  
COMPANY.]

AGREEMENT AND DECLARATION OF TRUST

This agreement and declaration of trust made this seventh day of September, 1915, by Boston Safe Deposit and Trust Company, a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, hereinafter called the "Trustee,"

WITNESSETH THAT

WHEREAS, It is desirable that the principal of any fund devoted to charitable purposes be placed in the

safekeeping of a permanent trustee in order that it may be safely, conservatively and intelligently invested to the end that the principal shall remain unimpaired, while, at the same time, a stable and reasonable income shall be produced; and

WHEREAS, It is oftentimes not feasible to determine whether or not a charitable object may continue indefinitely to be worthy, and it is desirable that the income of such a fund be applied from time to time to charitable purposes which shall be most deserving of assistance at the time such income shall become available;

NOW, THEREFORE, The Trustee agrees and declares that it will accept and hold gifts made to it as Trustee hereunder, whether such gifts be made by gift *inter vivos* or by devise or bequest or otherwise, for the uses and purposes and subject to the powers and duties hereinafter set forth. All property so accepted and held shall be designated as the "Permanent Charity Fund."

*First.* The Trustee shall have full power and authority at all times to invest and reinvest the principal of this Fund in both realty and personalty and generally to manage, care for and control the same with all powers necessary or convenient for such purposes. Without in any way limiting the generality of the foregoing, the Trustee shall have the following powers:

To sell, exchange or transfer any or all and any part or parts of the said principal upon such terms and conditions and in such manner and form as it may deem best, and to execute, acknowledge, deliver and record any deed, contract, proxy, power of attorney, or other instrument relating to the same which it may deem necessary or advisable, and no purchaser, transferee or other person dealing with the Trustee with regard to



said principal shall see to the application of money or property paid to the Trustee.

To lease any or all and any part or parts of the real estate at any time held by it hereunder upon such conditions and for such term or terms as it deems best.

Upon the affirmative vote of three-fourths of the entire Board of Directors of the Trustees, at a meeting specially called for the purpose, to mortgage any real estate at any time held by it hereunder, to such an extent and upon such terms and conditions as three-fourths of its Board of Directors shall deem best.

To determine all questions whether any money or things coming into its possession shall be treated as principal or income, and to determine the mode in which the expenses incidental to or in connection with the execution of the trust ought to be borne as between principal and income, and to apportion the same between principal and income as it shall deem just and equitable, and this power shall include, without the generality thereof being hereby restrained, the power to determine in case any investment shall at any time be at a premium in any bond or security for money or in any wasting investment so called, whether and to what extent and in what manner any part of the actual income of such bond, security or other investment shall be dealt with as principal with a view to prevent the diminution of the trust, and also the power to establish and maintain, in such manner and to such extent as it deems necessary or proper, a sinking fund or sinking funds to provide for payment or reduction of any mortgage upon any real estate at any time held by it hereunder.

The Trustee may retain any property, stock, bond or other security given to it hereunder as long as it deems

advisable without being liable to any person for such retention.

The Trustee is fully authorized to exercise the powers and authority, whether discretionary or otherwise, herein given to it through agents or employes appointed by it, and to select and employ suitable agents and employes in and about the execution of the trust, and to pay their reasonable compensation and expenses, and also reasonable compensation for its own services.

The Trustee shall in no event be held liable for any neglect or wrongdoing of such agents or employes provided it exercised reasonable care in their selection; nor shall the Trustee be liable for any loss unless it shall happen through its own wilful default.

*Second.* The income of this Fund, less proper charges, expenses and deductions, shall each year forever be applied to such charitable purposes as the committee hereinafter provided for shall in its own uncontrolled discretion from time to time select or determine. Without in any way limiting the charitable purposes for which said income may be used, the said Committee may from time to time select or determine objects or purposes of benevolence or charity, public or private, including educational and charitable institutions, whether incorporated or not, and the relief of individual needs regardless of race, color or creed. Said Committee shall, unless otherwise specifically provided, exercise all the powers, authority and discretion herein given to it through a majority of its membership.

*Third.* The Committee to select or determine the objects and purposes to which the income shall be applied, hereinafter called the "Committee," shall consist of seven members, each of whom shall be a resident of

the Commonwealth of Massachusetts, and preferably men or women interested in charitable work, and possessing a knowledge of the civic, educational, physical or moral needs of the community, preferably of but one of such needs, and in no event shall any person seeking or holding political office be a member of said Committee, nor shall any person whose religious sect or denomination is the same as that of any two members of said Committee be eligible to membership thereon. Said seven members shall be chosen as follows:—

One by the Chief Justice or the senior or presiding judge of the Municipal Court of the City of Boston or the court that may hereafter exercise the jurisdiction of said court in Boston.

One by the senior or presiding judge of the Probate Court of Suffolk County or the court for the time being having jurisdiction of the settlement of estates for the judicial district in which the City of Boston shall lie.

One by the senior or presiding judge of the United States District Court for the district of Massachusetts, or of the court that may hereafter exercise the jurisdiction of said court in the judicial district in which the City of Boston shall lie.

One by the Attorney-General of the Commonwealth of Massachusetts or the law officer of the Commonwealth in whom may hereafter rest the supervision of charitable trusts in the Commonwealth.

Three by the Trustee preferably to be designated from its Board of Directors.

If any question arises as to the official herein authorized to make appointments, or as to the qualifications of the persons appointed, the decision of the Trustee shall be final and conclusive with respect thereto. If any one

or more of said officials fails to make appointments within thirty days after being notified in writing by the Trustee to do so, then the Trustee shall be authorized to make such appointments.

All appointments shall be for the term of five years and until the successor is chosen and qualified, except that the first appointments shall be made as follows:—

One member by the Attorney-General, one year.

Two members by the Trustee, two years.

One member by the senior or presiding judge of the United States District Court for the district of Massachusetts, three years.

One member by the senior or presiding judge of the Probate Court of Suffolk County, three years.

One member by the Chief Justice of the Municipal Court of the City of Boston, four years.

One member by the Trustee, five years.

Vacancies in the Committee caused by death, resignation, refusal or inability to serve or otherwise, shall be filled by the authority entitled to make the original appointment as aforesaid. In the event of failure to make such appointment within thirty days after receipt from the Trustee, of written notice of the vacancy, such appointment shall be made by the Trustee. If any member of the Committee removes from the Commonwealth of Massachusetts, or fails for a period of six months to attend committee meetings, or seeks or occupies political office, he shall thereby automatically be disqualified, and upon written notice from the Trustee to the proper appointing authority, which notice shall be conclusive as to the fact of such disqualification, a vacancy shall be created which shall be filled as above provided. The secretary of the Committee shall be appointed by and

hold office subject to the will of the Committee. The expenses of the Committee, including such compensation to the secretary as the Trustee shall fix, shall be paid out of income, but the members of the Committee shall serve without compensation.

The Committee shall annually organize by the election of a chairman and such other officers as it desires and by the adoption of such rules governing its proceedings as it deems necessary or desirable. It shall keep complete records of its proceedings, copies of which shall be filed with the Trustee on or before the twentieth day of January in each year.

*Fourth.* Disbursements of income shall, except as hereinafter provided, be made by the Trustee only and upon written orders signed by a majority of the Committee, stating that said orders were authorized by votes passed at properly called meetings of the Committee, and such written orders shall constitute full and complete authority to the Trustee for the disbursements therein called for. Failure of the Committee for twelve months to file disbursement orders with the Trustee, shall empower the Trustee to exercise the powers and duties herein given the Committee, and in that event to make disbursements of income without the above-mentioned written orders.

*Fifth.* Should a successor trustee or trustees be for any reason whatever appointed during the continuance of the trust hereby created, such trustee or trustees shall have all the powers and duties, discretionary or otherwise, herein given the Trustee, and upon the appointment and acceptance of such successor trustee or trustees the trust fund shall vest in it, him or them without any further act or conveyance as if it, he or they had been the original trustee.

*Sixth.* In case a court of last resort shall decree that the provisions hereof requiring the approval of the Committee to the disbursement of income, are invalid, the powers and duties herein given the Committee shall thereupon be vested exclusively in the Trustee, and thereafter said Committee shall act in an advisory capacity only, and the written orders provided for in Article Fourth may be dispensed with.

*Seventh.* The Trustee may accept gifts as to which the donor has expressed a desire that the income thereof shall for a definite or indefinite time be used for particular charitable purposes, and if such gifts are accepted the Committee shall respect and be governed by the desires or wishes of the donor, provided, however, that if the Committee shall, by a vote of five-sevenths of its entire membership, determine that, for the period named in the vote or until further action of the Committee, it is contrary to the spirit or intent of the desires or wishes of the donor or that it is unwise or impracticable to apply the income to the purposes indicated by the donor, such desires or wishes shall not, during such named period, be binding upon the Committee, and shall not prevent the application of the income, during such named period, to such other charitable purposes as the Committee may, by a majority vote, deem advisable.

*Eighth.* The Trustee may accept gifts subject to directions of the donor to pay the income to individuals for life or for term of years, and if such gifts are accepted, such directions shall be binding until the expiration of such lives or terms of years, and thereafter such gifts shall be held for the charitable objects and purposes herein set forth.

*Ninth.* In case the Trustee and the Committee



deem it desirable the Committee may become incorporated as a charitable corporation under the laws of the Commonwealth of Massachusetts for the purpose of administering the income of the Fund, and of performing the duties and powers herein given to the Committee, and the charter or by-laws of such corporation shall include, by reference or otherwise, such of the limitations and provisions hereof as relate to such corporation or its members, and such as relate to the Committee or its members, and apply to such corporation or its members. The members of said corporation shall be appointed and all vacancies shall be filled in the same manner as provided for the members of the Committee, and the provisions relating to the qualifications and disqualifications of the members of the Committee shall apply to the members of the corporation. Said corporation shall act by a majority vote of its members except that where any act, approval or consent of the Committee is required to be done, made or given by a certain fraction of the Committee, such act, approval or consent shall be done, made or given by said corporation in accordance with a vote of the same fraction of its members. In general, all the provisions hereof relating to the Committee and its members shall apply to said corporation and its members, except that the following provisions, although in conflict with the foregoing provisions hereof, shall govern:—

(1) The net income available for charitable objects and purposes shall annually be paid over by the Trustee to said corporation to be by it distributed to and among the charitable objects and purposes herein set forth, subject always to the expressed desires or wishes of any donor as provided in Article Seventh hereof, and the

Trustee shall not be responsible for the application of said income.

(2) The corporation may appoint such employes or agents as it deems necessary. The expenses of the corporation, including such compensation to the employes or agents thereof as the Trustee shall fix, shall be paid by the corporation out of the net income paid over to it, but the members of the corporation shall serve without compensation.

(3) The accounts of said corporation, showing receipts and disbursements on account of income and the condition of income on hand, if any, shall annually be audited by an auditor employed by the Trustee.

(4) In case such corporation should for a period of twelve months neglect or refuse to distribute the income paid over to it, the Trustee may upon written notice to said corporation remove any one or more of its members and appoint members of its own Board of Directors to fill the unexpired terms.

(5) In case a court of last resort shall decree that the provisions hereof relating to the incorporation of the Committee are invalid, such provisions shall be deemed to be stricken herefrom and to be as if never inserted herein, and the Committee shall exercise all its rights, powers and duties as fully as if it had never been incorporated; provided, however, that if the provisions hereof requiring the approval of the Committee to the disbursement of income shall also in like manner be decreed to be invalid, the powers and duties of the Committee shall be vested in the Trustee, and the Committee shall become advisory only, as set forth in Article Sixth hereof.

(6) The Trustee and the said corporation may, if

they deem it desirable, wind up and dissolve said corporation, and upon such dissolution and thereafter the Committee shall exercise all the powers and duties herein given to it as fully and completely as if said corporation had never been formed.

(7) Upon dissolution of the corporation under (5) or (6) the then members of the corporation shall be the then members of the Committee as if the corporation had never existed.

*Tenth.* Each and every of the powers, purposes and provisions hereof, except as otherwise provided, shall be regarded as separate and distinct from every other power, purpose and provision, so that no one shall be limited by reference to or inference from any other, and the enumeration of specific purposes and powers shall not be construed to limit or restrain in any manner the meaning of general terms. If a court of last resort shall decree that any of the powers, purposes or provisions hereof are invalid, this shall not in any wise limit any other power, purpose or provision hereinbefore granted, but only such power, purpose or provision so decreed to be invalid shall be limited, and all other powers, purposes and provisions herein granted, shall be unmodified thereby.

*Eleventh.* Neither the Trustee nor any successor trustee or trustees shall be required to give bond or any surety upon a bond for the faithful performance of the trust hereby reposed in it, him or them.

*Twelfth.* The Trustee may, by a vote of four-fifths of the entire number of its Board of Directors and with the approval of five-sevenths of the Committee and with the assent of the Attorney-General of the Commonwealth

of Massachusetts or the law officer of the Commonwealth who may hereafter have the supervision of charitable trusts, change the name of this Fund, the methods of distributing income and other details of the machinery of administration, but no such change shall in any way alter or abridge the charitable objects and purposes of the trust.

*Thirteenth.* This Agreement and Declaration of Trust may be printed and executed in as many copies as seem desirable, each one of which shall be an original and, as such, entitled to record. At least one copy shall always be kept on file and open to public inspection in the office of the Trustee.

*Fourteenth.* Any margined notes which are inserted are for convenience of reference only, and shall not affect the construction of this Agreement and Declaration of Trust.

IN WITNESS WHEREOF, Boston Safe Deposit and Trust Company has caused its corporate seal to be hereto affixed and this Agreement and Declaration of Trust to be signed in its name and on its behalf by its officers thereunto duly authorized, the day and year first above written.

BOSTON SAFE DEPOSIT AND TRUST COMPANY

BY

CHARLES E. ROGERSON,

*President.*

GEORGE E. GOODSPEED,

*Treasurer.*

[Corporate Seal of  
Boston Safe Deposit  
and Trust Company.]

COMMONWEALTH OF MASSACHUSETTS }  
SUFFOLK } ss.

On this seventh day of September, 1915, before me appeared Charles E. Rogerson and George E. Goodspeed, to me personally known, who being by me duly sworn did say that they are respectively the President and the Treasurer of Boston Safe Deposit and Trust Company, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said Charles E. Rogerson and said George E. Goodspeed acknowledged said instrument to be the free act and deed of said corporation.

CHARLES M. ROGERSON,  
*Notary Public.*

[Notarial  
Seal.]

## Mortgage-Trustee Clauses Annotated

*Preliminary.* Forms of mortgage-trusts must necessarily differ in order to express the intention of the parties under the varying circumstances under which they are made. In the larger proportion of these changing provisions, the trustee is not greatly interested. It should know, however, that where legislation<sup>1</sup> has provided for the rights and duties incident to trusteeship, these need not be stated in the trust-deed.<sup>2</sup> It will therefore read a proposed trust, in the light of such legislation, and the general implied duties spoken of in section 56 of this book. It will not rely upon all its obligations being expressed within the four corners of the instrument.

For its protection against excessive liabilities, and to govern its compensation, conduct, resignation, removal, etc., certain covenants, which, for convenience, may be termed "trustee clauses," are usually inserted. Examples of such clauses, with notes covering their judicial construction, are given below:

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1. For citation of statutes of several states prescribing the rights and duties of the mortgagees of railroads, see Jones on Corporate Bonds and Mortgages, Sec. 316. An example of legislative provision for the construction to be placed upon particular covenants is found in Sec. 254 of the New York Real Property Law.

2. *Mercantile Trust Co. v. Portland & Ogdensbury R.* (1882), 10 Fed. 604.



### General Exemption of Liability Except for Willful Default.

*“The Trustee shall not be liable except for its own willful and intentional breaches of the said trust.”*

Such a clause was held in *Black v. Wiedersheim*<sup>3</sup> to exonerate a mortgage trustee from liability for alleged breaches of trust whereby the value of plaintiff's bonds had been completely lost. The judge said that with the above provision in mind, “he had read the testimony with care, and I find no evidence that should have been submitted to the jury of a ‘willful and intentional breach of trust.’ The defendant may perhaps have made mistakes, or may have misconceived his obligations, but to call the omissions to act of which the plaintiff complains ‘willful and intentional breaches’ of his trust seems to me to be impossible.”

In *Tuttle v. Gilmore*<sup>4</sup> it appears that the above clause was inserted in a conventional trust deed. Though its general effectiveness was recognized in the opinion, it did not prevent the trustee from being held liable for losses arising from his having made sales or investments without instituting proper inquiries. The Court said: “In my judgment it is clear both from principle and authority, that the liability imposed on and accepted by a trustee may be limited by the terms of the instrument creating the trust. If there is such a clause of limitation the rule for measuring the trustee's liability is to be sought in that clause properly construed. In construing such a clause, the meaning to be attributed to it should be consistent with the purpose and object of the trust, and a strict rule of construction should be applied

3. (1906), 143 Fed. 359.

4. (1883), 36 N. J. Eq. 617.

as against the claim of restriction. But if, when so construed, a limitation on the liability of the trustee was clearly intended, the trustee is entitled to the benefit of it."

A similar clause was likewise considered in *Hollister v. Stewart et al*<sup>5</sup> in fixing the liability of mortgage trustees. It was there held that as the acts complained of were done in good faith, judgment should run against "the trustees as such and not personally."

The New York Court of Appeals has said:<sup>6</sup> "The law requires the exercise of good faith and no matter how strong the provisions to shield from liability may be, there is no protection unless good faith is observed."

### Certifying the Bonds.

*"The bonds secured hereby shall not be valid until the certificate has been indorsed thereon by the trustee."*

Interest coupons detached from the bonds under a mortgage containing the above provision prior to the certification of the bonds by the trustee do not entitle the holder to payment. "The security of the mortgage inured only to the bondholders, as such, and to the extent only of the debt and accrued interest as represented by the bonds when certified by the trustee, since not until that act was performed did the bonds come under the lien of the mortgage."<sup>7</sup>

So where bonds were stolen before the trustee's certificate was attached, there could be no claim under

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5. (1889), 111 N. Y. 644, 19 N. E. 782. See also *Hunsberger v. Guaranty Trust Co.* (1914), 150 N. Y. Supp. 190, and *Partridge v. American Trust Co.* (1912), 211 Mass. 194, 97 N. E. 925.

6. *Industrial & General Trust, Ltd. v. Tod* (1905), 180 N. Y. 215, N. E.

7. *Holland Trust Co. v. Thomson-Houston El. Co.* (1902), 170 N. Y. 68, 62 N. E. 1090, affirming 62 N. Y. App. Div. 299, 71 N. Y. Supp. 51.

them, as they were void.<sup>8</sup> The court said: "The act of the trustee, when performed, was only to authenticate, that is, 'to determine as real and true;' until performed the bonds rested in 'supposition'; when performed its effect was to render them obligatory, and pronounce them genuine. As it has not been performed, the bonds were not complete or perfect and have not become the contracts of the railroad company."

### Indemnity and Written Request to Act.

*"The Trustee shall not be under any obligation to take any action toward the execution or enforcement of the trust hereby created, which, in its opinion, shall be liable to involve it in expense or liability, unless one or more of the holders of bonds hereby secured shall as often as required by the Trustee furnish a reasonable indemnity against such expense or liability; nor shall the Trustee be required to take any action in respect of any default unless requested to take action in respect thereof by a writing signed by the holders of not less than twenty-five per cent in amount of the bonds hereby secured, then outstanding and tendered reasonable indemnity as aforesaid, anything herein contained to the contrary notwithstanding. But neither any such notice or request, nor this provision therefor, shall affect any discretion herein given to the Trustee to determine whether it shall take action in respect of such default, or to take action without such request."*

### No Duty to Record.

*"It shall be no part of the duty of the Trustee to see to the filing, refiling, or recording of this mortgage."*

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<sup>8</sup> Maas et al. v. Mo., Kan. & Tex. Ry. Co. et al. (1880), 83 N. Y. 223.

Insertion of the above clause or one of similar import is an essential protection in the light of a decision<sup>9</sup> of the Circuit Court of Appeals in the second Circuit that a mortgage trustee, under a deed which contained no specific direction as to the trustee's duty to record, "is chargeable with any loss resulting from his neglect to record the trust deed." The claim of negligence by the trustee in this case, however, was held to be barred by laches and the New York statute of limitation. Such a clause does not prevent a trust company from making a special independent contract with a purchaser of bonds to record the mortgage and rendering itself liable for failure to do so.<sup>10</sup>

#### Exempting Trustee From Liability to See to Application of Funds.

*"Nothing herein contained shall be so construed as requiring the said trustee to inquire into the application of the funds, or of the bonds, which it may deliver over on receipt of such orders or requests as aforesaid."*

The above clause was held not to apply in defense of a trust company, when the claim against it was based upon its alleged obligation to exact from the mortgagor a statement showing the purposes for which each issue of bonds was to be used.<sup>11</sup>

#### Application of Sinking Fund.

*"The sinking fund shall be applied by the trus-*

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9. *Miles v. Vivian et al.* (1897), 79 Fed. 848.

10. *McCauley v. Ridgewood Trust Co.* (1911), N. J. 79 Atl. 327.

11. *Rhineland v. Farmers' Loan & Trust Co.* (1902), 172 N. Y. 519, 1. c. 529.

*tee: (a) Towards the purchase and retirement from time to time in such manner, and at such prices as may be approved by the trustee (not, however, exceeding the price at which such bonds under the terms thereof, be redeemed and retired) of one or more of the bonds secured thereby. (b) If, in the opinion of the trustee, bonds cannot be so purchased, then towards the redemption, in the manner provided in this article, of the bonds issued and outstanding hereunder, in their numerical order beginning with the lowest outstanding Bond."*

It was held, under the above clause, that the trustee was not justified in redeeming long-term bonds at a premium, in preference to serial bonds as they fell due. "In the exercise of a reasonable business discretion, the trustee would certainly allow the unmatured long-term bonds to remain unpaid, as long as it could find investment for the sinking fund, in the serial bonds which were maturing each year, and which it could call in payment and surrender upon any interest paying date. Only after the retirement of the serial bonds would it be justified in applying the sinking fund to the purchase of the higher priced long-term bonds. \* \* \* The trustee is bound to deal fairly and equitably with all parties to the transaction, and the discretion which it may use is a legal discretion, and not an individual and arbitrary judgment. Any abuse of discretion upon the part of a trustee is clearly a matter for correction in a court of equity.<sup>12</sup>

### Release of Property Pledged.

*"The railroad company shall have no right to*

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12. *Struthers Coal & Coke Co. v. Union Trust Co.* (1910), 227 Pa. St. 29, 75 Atl. 986.



*secure the withdrawal and release from the trust of any of the stock pledged under the agreement except upon the redemption and payment of all the bonds."*

This clause was held not to apply to nor prevent the withdrawal of stock deposited with the trust company in excess of the amount called for in the agreement. This excess was held by the trust company as bailee and not as trustee under the agreement.<sup>13</sup>

A clause is frequently inserted permitting a release of the property pledged, provided that money or property of equal value is substituted by the mortgagor. Such a clause is strictly construed.<sup>14</sup> No power to withdraw, sell, substitute or change the security, pending default, can be implied.<sup>15</sup> It must be expressly provided in the trust deed.<sup>15</sup>

### **Revocation of Foreclosure or Sale by Majority of Bondholders.**

*"It is expressly provided, however, that at any time prior to the sale of said securities, as hereinbefore set forth, the holders of a majority in amount of all the bonds secured by this indenture, at the time outstanding, may notify the said trustee, in writing, that they desire to revoke the declaration that the principal of said bonds is due, and shall take no further steps to sell said securities unless and until another default by the said parties of the first part; and all the provisions of this article shall relate to*

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13. *Missouri Pacific Railway Company v. Mercantile Trust Co.* (1912), 76 N. Y. Misc. 10.

14. *Mt. Vernon-Woodberry Cotton Duck Company v. Continental Trust Co. of Baltimore* (1913), 121 Md. 163, 88 Atl. 103.

15. *Colorado & Southern Ry. Co. v. Blair* (1915), 214 N. Y. 497, 108 N. E. 840.



*and govern any succeeding default by said parties of the first part."*

Upon revocation of demand for foreclosure by a majority of the bondholders, it was held that the above clause related only to a sale of the securities and not to foreclosure proceedings, and that minority bondholders had a right to insist that foreclosure be had. Judge Lurton, in part, said:

"If there is any proposition well settled in the courts of the United States, it is that limitations contained in a mortgage, restricting the right of foreclosure, must be strictly construed. \* \* \* Under the rule of strict construction, the provision requiring the trustee to 'take no further steps to sell said securities' applies only to a summary sale under the power vested in it by the mortgage. It has no application to a proceeding begun by it in a court of equity to secure a judicial foreclosure."<sup>16</sup>

### **Exemption From Personal Liability for Debts Contracted When Trustee Is in Possession.**

*"The Trustee shall not be personally liable for any debts contracted by it, or for damages to persons or property, or for salaries or non-fulfillment of contracts, during any period wherein the Trustee shall manage the trust property or premises upon entry or voluntary surrender as aforesaid."*

### **Registration of Bonds.**

*"The Debtor Company shall keep at the Trustee's office, in the city of New York, bond transfer books, on which the transfer of any of said bonds shall, upon request, be registered without expense to*

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16. Toler v. East Tenn., V. & G. Ry. Co. (1894), 67 Fed. 168.

*the holder. Each registration of a bond shall be noted on the bond, after which no transfer therefor can be made, except on said books, until registered payable to bearer, when the bond will become transferable by delivery until again registered in like manner in the name of the holder. For the purpose of administering the trust created by this mortgage, the person in whose name any bond is registered on said books shall be taken to be the holder and owner thereof."*

Registration of bonds and its assimilation to registration and transfer of stock is treated in Chapter XIII of this book.

### **Power to Employ Agents—Limitation of Liability For.**

*"The Trust Company may employ agents or attorneys in fact, and shall not be answerable for the default or misconduct of any agent or attorney appointed by it in pursuance hereof if such agent shall have been selected with reasonable care."*

Clerical duties may be delegated by the trustee without express authority.<sup>17</sup>

### **Recitals in Deed and Bonds.**

*"The recitals and statements of fact herein contained and contained in the bonds secured hereby shall be taken as statements by the Mortgagor Company, and shall not be construed as made by the Trustee."*

### **Requests by Bondholders to Be in Writing.**

*"Any request or other instrument required by this mortgage to be signed and executed by bondholders shall be authenticated by an instrument or*

17. 28 Am. & Eng. Encl. of Law (2nd Ed.), 767; employment of auctioneer to conduct sale is a proper delegation of authority, *Coplan v. Sohn* (1914), 82 S. E. 1016.

*instruments in writing signed by the persons assenting thereto, or their attorneys in fact duly authorized for that purpose and proven as herein provided. Any instrument in writing required by the provisions of this mortgage to be executed by the holders of bonds hereby secured may be in any number of parts."*

#### **Proof of Request by Bondholders.**

*"The fact and date of the execution by any person of any such request or other instrument or writing may be proven by the certificate of any notary public or other officer authorized to take acknowledgments of deeds that the person signing such request or other instrument acknowledged to him the execution thereof, or by an affidavit of a witness to such execution."*

#### **Proof of Request and Ownership of Bonds.**

*"The amount and serial numbers of bonds held by any person executing any such request or other instrument, and the date of his holding the same, may be proven by a certificate executed by any trust company, bank, bankers or other depository (wherever situated), showing therein that at the date therein mentioned such person had on deposit with said depository the bonds described in such certificate. The ownership of registered bonds shall be proven by the registers of such bonds. Such proof shall be conclusive in favor of the Trustee with regard to any action by it taken under such request or other instrument."*

#### **Insurance and Taxes.**

*"It shall not be any part of the Trustee's duty to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance, or to keep itself informed*

*as to the payment of any taxes or assessments, or to require such payments to be made, but the Trustee may, in its discretion, do any or all of these things."*

### Compensation of Trustee.

*"The Trust Company shall be entitled to reasonable compensation for all services rendered by it in the execution of this agreement, and such compensation as well as all reasonable expenses necessarily incurred and actually disbursed hereunder the mortgagor company agrees to pay."*

An express provision in the trust deed for "just" compensation has been held to exclude a statutory rule (Sec. 3320 N. Y. Code of Civil Procedure) providing for the compensation of a "trustee of an express trust." It was thought that these rules did not necessarily apply to a mortgage trustee.<sup>18</sup> Nevertheless, where a mortgage trustee had brought foreclosure proceedings and had brought considerable other litigation in behalf of the bondholders, he was entitled to compensation at the rate usually awarded to executors and administrators.<sup>19</sup>

A clause similar to the above does not give the trustee a lien on the mortgaged property to secure payment for services performed.<sup>20</sup> Hence the advisability of inserting the next succeeding clause.

### Compensation and Expenses as Charge Upon Estate.

*"Such compensation and all expenses of pro-*

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18. *Miami Gas & Fuel Co. v. Mills* (1913), 157 N. Y., App. Div. 542, 142 N. Y. Supp. 862.

19. *Woodruff v. N. Y., L. E. & W. R. R. Co. et al.* (1891), 129 N. Y. 27, 29 N. E. 251.

20. *Mercantile Trust & Deposit Co. v. Pickerell* (1888), 99 N. C. 139, 5 S. E. 417.

*tecting the trust estate, and all legal and other expenses actually incurred by the Trustee, shall constitute a charge upon the hereby mortgaged premises, and the proceeds thereof paramount to the bonds secured by these presents."*

See *Mercantile Trust & Deposit Co. v. Pickerell*,<sup>20</sup> *supra*.

### Resignation of Trustee.

*"The Trustee may resign the trust hereby created and become and remain wholly discharged from all further duty or responsibility thereunder upon giving sixty days' notice in writing to the Railway Company, or such shorter notice as the Railway Company may accept as sufficient."*

Express resignation of the trustee is unnecessary where he abrogates the trust.<sup>21</sup>

### Removal of Trustee by Vote of Bondholders.

*"The Trustee may be removed from office at any time by an instrument in writing under the hands of the holders of three-fourths in par value of the bonds hereby secured and then outstanding."*

A provision largely similar to the above was held controlling, and to prevent the removal of the trustee by legal proceedings where good reasons were not shown for disregarding this voting method.<sup>22</sup>

### Appointment of Successor Upon Removal of Trustee.

*"A majority in number and value of the bond-*

21. *Reynolds v. Kraff* (1898), 144 Mo. 433, 46 S. W. 424.

22. *Dillaway et al. v. Boston Gaslight Co. et al.* (1899), 174 Mass. 80, 54 N. E. 359.



*holders may, by an instrument in writing, under their hands, duly acknowledged or proved, and recorded, appoint or select one or more person or persons, or any other corporation, to be a trustee under the mortgage in case of the removal of this Trust Company."*

Such a clause is effective for the purposes stated, and upon an action for removal of trustee eliminates any question which might otherwise exist as to a Court's power to appoint a successor.

It was thus characterized in the case cited:<sup>23</sup> "This provision secures ample authority to the bondholders to select a trustee to execute and enforce the trust and obligations created by the mortgage if this Trust Company shall be removed by the judgment of this court from its position. And that, certainly, tends to restrict this litigation (action for removal) to the determination whether the trustee shall or shall not be removed from its office under the mortgage."

The selection of a trust company as successor trustee under such a provision was upheld in *Farmers Loan and Trust Co. v. Hughes*.<sup>24</sup>

### Acceptance by Substituted or Successor Trustee.

*"Any such new Trustee appointed hereunder, shall execute, acknowledge and deliver to the Trustee last in office and also to the Railway Company an instrument accepting such appointment hereunder, and thereupon such new Trustee without any further act, deed or conveyance, shall become vested with all the estates, properties, rights, powers,*

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23. *Gibson v. American Loan & Trust Co.* (1890), 58 Hun. (N. Y.) 443, 449.

24. (1877), 11 Hun. (N. Y.) 130.



*trusts, duties and obligations of its predecessor in the trust hereunder, with like effect as if originally named as Trustee hereunder."*

Acceptance of a mortgage trust is presumed.<sup>25</sup>

### Conveyances to Substituted or Successor Trustee.

*"The parties shall in any such case make and execute upon request whatever deeds, conveyances, transfers, assignments, releases and assurances may be legally necessary and advisable for the more fully vesting in and confirming to such new Trustee, such estate, rights, powers and duties; and the Trustee ceasing to act shall duly assign, transfer and deliver any property and moneys held by such Trustee to the new Trustee so appointed in its place."*

Insertion of the above clause is a proper precaution, though under the ordinary provisions for successorship, title to the property conveyed by the trust deed vests in the successor trustees.<sup>26</sup>

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25. National Bank of Goldsboro v. Hill (1915), 226 Fed. 102.

26. Craft v. Indianapolis D. & W. Ry. Co. (1897), 166 Ill. 580, 46 N. E. 1132.

Report of the Committee on Railroad Bonds and  
Equipment Trusts to the Board of Governors and  
Members of the Investment Bankers' Asso-  
ciation of America at Their Third An-  
nual Convention Held at Philadel-  
phia, November 12, 1914

INTRODUCTION.

In the report made by your Committee to the Board of Governors at their meeting in Boston in August an outline was given of the work of the Committee up to that date. In view of the fact that a knowledge of the matter presented in this report is essential to an intelligent consideration of the whole subject under discussion, it seems wise to your Committee, even at the risk of repetition to review the work done by the Committee up to that time, and to then bring forward the discussion to the present date by a review of the work done since our last report. The members of the Association will recall that when the Committee on Railroad Bonds and Equipment Trusts was first formed in 1912, the Committee as then constituted took up, by correspondence with the principal Trust Companies in New York, Boston, Chicago, Philadelphia, Cleveland, Baltimore, Pittsburgh, etc., who had acted as Trustees under indentures securing Equipment Trusts, what was the general practice of these Trustees

to provide for the maintenance by the Railroads of the equipment pledged under such Trusts, for the replacement of equipment worn out, lost or destroyed, and what steps these various Trust Companies took to keep themselves advised as to the condition of the equipment pledged under the Trust. At that time it was found that there was no general course of action common to all the Trust Companies. In some cases the Trust Companies used definite forms for periodical reports on the condition of the equipment, but the amount of responsibility assumed by the Trustees varied from an honest effort to protect and maintain the value of the security pledged for the Equipment Trust, to a position assumed by one Company that it had no responsibility whatever for the security underlying these equipment obligations, and that they did not consider it part of the duty of the Trustee to see that the covenants of the Trust were carried out. On the whole, however, it was clear that the Trust Companies were using their best efforts to protect the investor in Equipment Trust obligations, and that the difficulties which they had to overcome were largely due to the fact that the banking houses who originally purchased the Equipment Trust had not been insistent that specific agreements be included in the indenture which would enable the Trustees to obtain the necessary information from the Railroads as to the condition of the Equipment pledged; and secondly, if it was found that the Railroad was not maintaining the equipment properly, the Trustees had no power to force the Railroad to maintain or replace the equipment by declaring a default under the indenture.

The whole question of Equipment Trusts and the sufficiency of equipment as security for an Equipment

Trust is one which goes into the very heart of the theory and the practice of railroad accounting, bringing with it questions as to what is adequate maintenance and what is the true value from time to time of equipment through its depreciation year by year. The practical constructive work to which your Committee has endeavored to confine itself has been to prepare, and to suggest the incorporation of, certain clauses in indentures securing Equipment Trusts. It is our belief that these clauses will enable the Trustee who honestly and faithfully tries to carry out his duties as provided in the Trust Agreement to maintain the value of the equipment pledged as security under the Trust.

During the past year a number of conferences have been held by your Committee with the representatives of the different Trust Companies, with banking firms handling Equipment Trusts with various counsel and with the executive officers of a number of Railroads who are most conversant with the practice of issuing equipment obligations. In these conferences your Committee has found a most laudable spirit of co-operation and desire on the part of all parties to do whatever was reasonable and proper to ask them to do to protect the investor.

Nevertheless the fact remains that the Trust Companies accept Trusteeships under indentures which are approved as to their legality but which are not, if the truth were known, altogether satisfactory.

While conditions affecting the management, auditing and financing of the corporations of this country have undergone many changes during the past few years, all of which changes tend to safeguard and protect the interest of the investor in the securities of these corporations,

and while there has been a growing realization of the obligation of the Trustee to the public, yet the development of the indenture securing Railroad Bonds and Equipment Trusts has been along lines to make these indentures more and more flexible and more and more of a character to enable the borrowing corporation to best serve its own ends rather than to protect the interest of the investor. The whole theory of the Equipment Trust which was based on an original cash payment of 20 per cent with a loan maturing in not more than ten annual installments and with the title to the equipment remaining at all times in the hands of the Trustee or Banker making the loan has changed till now we have Equipment Trusts running fifteen years or longer with 10 per cent cash paid in instead of 20 per cent, with the title of the Equipment being held by a corporation or by individuals who are nothing else but the railroad itself acting under a different name; and in one case an Equipment Trust has been issued by one of the most important railroads, over \$1,000,000 of which are outstanding at the present time in the hands of the investor, where the title to the equipment has reverted back to the railroad against each installment of principal paid, which vitiates the fundamental principle of Equipment Trusts, viz.—that there be a constant amount of collateral pledged for an ever decreasing amount of the loan, the value relative to the amount of the loan being so preserved despite depreciation or obsolescence of the collateral so pledged. These factors should receive the serious thought of the Investment Bankers. Your committee, however, has confined its work to an endeavor to improve the indentures securing Equipment Trusts.

PROVISIONS TO BE INCORPORATED IN THE EQUIPMENT  
TRUST INDENTURES.

These principal matters which need, in the judgment of your Committee, to be especially considered in the drawing of Equipment Trust Indentures, group themselves under the following heads:

I. *The Proper Vesting of Title in the Trustee to the Equipment Pledged under the Equipment Trust.*

This problem is one of the most important, and no matter how well the actual indenture may be drawn, if it does not sufficiently cover this important detail, the safety of the investor is not fully provided for. The subject is complex and intricate and we cannot enter into a full discussion at the present time. We can merely point out that the Trust has to be protected against three classes of persons:

A. Attachments and judgment creditors of the Railroad Company.

B. Purchasers for value and subsequent mortgages of the Railroad Company.

C. Prior mortgages which contain the usual after-acquired property clause covering rolling stock.

As to the first two, the existing special rolling stock recording acts which have been passed in practically every State of the Union and in Canada, protect the Trust against these classes of claimants, if the Trust Agreement is properly recorded; but here we run into a difficulty, inasmuch as cars are moved all over the United States and Canada in the ordinary course of business, while the Company which owns the cars may have lines only in one or two States. It is not the custom to record the Agreement of a Company whose line is solely in New York for instance, in every State of the Union, and the



question arises as to whether title to these cars will be properly protected in other States in case they were sold there to a purchaser without notice, or caught through attachment.

With regard to prior mortgages containing the after-acquired property clause, the important thing is to make perfectly sure that the title to the equipment vests in the Trustee of the Equipment Trust before the Railroad acquires any title whatever thereto; for it is obvious that if, for instance, a Railroad Company constructs or acquires cars and thereafter, by arrangement with bankers and a Trust Company, goes through a form of then making a conditional sale—in which case the title to the equipment comes to the Railroad subject to the prior lien of the Equipment Trust—is rather in the nature of a chattel mortgage, and being made subsequent to the Railroad's existing mortgages, gives to the Trustee of the Equipment Trust only a junior lien and not a first lien on the cars pledged. It is therefore extremely important always to provide that no part of the equipment to be covered by the Trust shall be delivered to the Railway Company prior to the execution and filing for record of the Agreement, and in your Committee's opinion also, the agreements for the construction of the cars should be made directly between the car manufacturers and the bankers or the Trustee of the Equipment Trust.

Of recent years a great deal of laxity seems to have become prevalent with respect to these details, due largely to the fact that it is usually extremely inconvenient to the Railroad Company to go through the necessary steps which are involved in the process of preventing the title from vesting prior to the execution and recording of the Trust. In addition various schemes have been prepared by which individuals or car companies acquired

cars from time to time for the uses of a particular Railroad, arranging for leases of the same to the Railroad and thereafter selling equipment leased certificates to bankers. Although this practice has become quite common, these arrangements are open to question on the ground that these individuals are usually either the Railroad itself in a different form, the stock of the car company usually being owned by the Railroad Company, and the individuals being agents of the Railroad Company and not representing anybody else.

We do not refer here to the so-called form of Equipment Trust issued under what is commonly known among bankers as the Philadelphia Plan, but to certain other forms of Trusts in which individuals appear as the lessors. We have gone into this question at great length because we feel that while the investor has, up to the present time been fortunate in the very few defaults which have occurred under Equipment Trusts, with the changing conditions now confronting the railroad industry, it is of the utmost importance that in the future more than usual care be taken in the drawing of these indentures and in the protection of the investor. Through long practice and a feeling of false security arising from the fact that there have been so few defaults of Equipment Trust in the past, both the Investment Banker and the Investor has become careless in his investigation as to the form of the indenture, under which the Equipment Trusts which he purchases have been issued.

## II. *Maintenance of Equipment.*

The maintenance of Equipment pledged under the indentures at all times in good workable order and the replacement of worn-out, lost or destroyed equipment, appears to your Committee to be a phase of this question

which should receive much more careful attention than has been accorded to it in the past. While we realize that almost all Equipment trusts have provision in the indenture requiring that equipment shall be maintained or replaced, it has unfortunately not been the practice of many Trustees or of the banking firms handling Equipment Trusts to require of the Railroads that these provisions in the indenture shall be lived up to, and to insist that the Railroads officially perform the obligations that they originally agreed to. During the past year a number of situations have arisen where when a railroad has got into or was facing financial difficulties we have found that the equipment pledged under the Equipment Trusts have become so depreciated in value as to seriously impair the security of the Trust Certificates issued against it. When cars were lost or destroyed, new equipment has not been added. When cars have been withdrawn from service owing to their bad condition, these cars have not been repaired and their value maintained. New equipment has been bought by means of the issuance of additional new Equipment Trusts, while needed repairs on equipment already owned have not been made, which repairs, if they had been made, would have made the purchase of additional equipment unnecessary.

The necessity of a road making as good a showing as possible of net earnings in order to preserve their credit for additional borrowing has tempted roads to resort to capital expenditures rather than to maintenance charges, which being charged to operating expenses would in turn be reflected in their statement of net earnings. In order to prevent such practices, your Committee deem it wise to have regular reports made to the Trustee by the Railroads, covering the condition of the equipment pledged, and we strongly urge that the Invest-

ment Banker face the responsibility accruing to him when he handles Equipment Trusts to see that these reports by the Railroads are made to the Trustees; that the Trustees keep accurately informed as to the value of the equipment from time to time, and that in case the value of the equipment is not maintained by the Railroads, the Trustees be placed in a position to take such action as shall conserve and protect the interest of the investor. To accomplish this end, your Committee has, after consultation with various Trust Company officials and Railroad officers, prepared forms to be used in making reports as to the condition of the equipment, which forms are attached to this report, and which we urge be used by the Railroads and the Trust Companies.

### III. *Funding of Payment of Principal and Interest.*

One of the fundamental principles of an Equipment Trust is that each six months or each year a certain proportion of the certificates outstanding shall be paid off and retired, so reducing the amount of indebtedness against any given amount of equipment pledged. In this manner the depreciation of the equipment is offset as far as the security of the loan is concerned by a reduction in the amount of the indebtedness against such equipment. Your Committee has found, in looking into a number of these indentures, that no provision has been incorporated in the indenture to prevent the extension of such maturing obligations, and we strongly recommend that a clause be included in indentures which will prevent such extension. In order to safeguard against this practice we believe that the necessary funds sufficient to pay the principal and accrued interest of notes as they may become due should be deposited with the Trustee to be

used for the payment of such notes, and that when such notes are paid they should be cancelled and no notes in substitution of them issued. It is of the utmost importance that no purchase or sale of notes or advances upon the same shall operate to keep equipment notes alive after maturity, nor should the Railway Company extend or consent to the extension of the time of the payment of the principal or interest of any Equipment Trust.

#### IV. *Enforcing Clause.*

In order that the Trustee may be placed in a proper position to protect the investor, it is necessary that an enforcing clause be included in the indenture, which will enable the Trustee to declare a default if the provisions of the indenture are not lived up to by the Railroad Company.

Your Committee also strongly recommends that when an Equipment Trust is drawn, provision be made that the Trustee shall be given full and complete drawings describing the equipment pledged so that in case of default the Trustee may have a full record and complete information to enable it to effect sale of the equipment or to take such other steps as it may deem wise for the protection of the Trust.

With the advice of counsel your Committee has prepared certain specimen clauses to be included in indentures securing Equipment Trusts, which we believe cover the above requirements, and your Committee recommends that Investment Bankers handling Equipment Trusts study these clauses which are appended to this report and wherever possible have such clauses or clauses similar to them incorporated in the indenture securing Equipment Trusts which they may sell to their clients. We believe that if the strong public opinion is aroused



which will demand that clauses of this character be included in the indenture, then the principal weakness inherent in Equipment Trusts will be removed.

#### THE OBLIGATION OF THE INVESTMENT BANKER.

Your committee feel that it is necessary to enlarge on one most important phase of this question which must be self-evident to you all. The value of the collateral under any loan and the maintenance of the value of such collateral can be safeguarded to a certain extent by the terms of the indenture, and by establishing through the pressure of well directed public opinion an active oversight by the Trustee of the methods pursued by the Railway Company in living up to the terms and spirit of the indenture.

This, however, is but a means to the desired end.

Eagerness to do business bred by over-keen competitive conditions have led many of us in the past into situations where securities have been bought and sold before sufficiently careful intelligent investigation was made of the terms of the indenture, and perhaps what is of even greater importance, without thoroughly considering the moral risk involved in the loan arising from the methods and character of the management of the borrower.

The responsibility of the Investment Banker does not cease with the sale of the Equipment Trust Certificates to his clients. It is the part of wisdom to investigate at regular intervals whether his and his clients' interests are being properly safeguarded both by the Railway Company and by the Trustee. "A stitch in time saves nine," says the old adage and the Investment Banker could many times have prevented the difficult and unpleasant situation confronting his client and him-



self if he had followed the useful course of doing what he could to prevent the loss by consistently and regularly keeping himself advised as to the true situation and value of the equipment pledged from the time he assumed the responsibility of the loan by placing it with his client.

The greatest evil today in connection with the problem of Equipment Trusts, the Investment Banker and the Investor is this neglect of investigation and regular oversight. If our members will make themselves familiar with what provisions should be included in a properly drawn indenture securing Equipment Trusts, if they will refuse to handle Equipments unless the indenture be properly drawn, and if they will continue to guard their clients' interests regularly and systematically after they have placed the issue by seeing to it that both the Trustee and the Railway Company live up to the terms of the Equipment Trust agreement that both entered into, then, they will make it difficult for many of the evils to exist which are now confronting our profession of Investment Bankers.

### **Clauses to Be Incorporated in Indentures Securing Equipment Trusts**

#### **CLAUSE I.**

##### **TO COVER REPORTS TO THE TRUSTEE AS TO THE CONDITION OF EQUIPMENT PLEDGED**

Within thirty days from the first of each January and July and at such times as required by the Trustee until the full performance of this agreement the Railway shall furnish a complete statement as of the date stated of the equipment covered hereby. This statement shall show for the period for which it is made, the numbers and description of such cars and engines as may have

been destroyed or substituted by others, the numbers and cost of all cars and engines built or purchased to replace destroyed equipment, equipment repaired during the period, and equipment awaiting repair. Shall show further what cars and locomotives are in use and the number of pieces in bad order or permanently withdrawn from service, but it need not show their whereabouts more in detail. This and other information required shall be set forth in a form substantially like the one annexed as schedule.

(If it is not desired to annex the specific form recommended, the last sentence can be omitted.)

## CLAUSE II

### COVERING MAINTENANCE AND REPLACEMENT OF EQUIPMENT

The Railway Company shall and will at its expense at all times keep all such equipment and any equipment that may be used to replace any part thereof in good working condition to the satisfaction of the Trustee.

If any locomotive, car or other equipment covered by this indenture shall be lost, worn out or destroyed or permanently withdrawn from service for any cause whatsoever, the Railway Company within six months from the date when said equipment shall have become withdrawn from service for any of the above causes, shall replace said equipment by other equipment of like character and equal value, and shall place said equipment subject to the indenture securing this equipment trust. If the Railway Company, however, elect not to replace said equipment lost, worn out, destroyed or permanently withdrawn from service within six months from the date said equipment has become lost, worn out, destroyed or permanently withdrawn from service,

then the Railway Company forthwith shall deposit with the Trustee an amount in cash equal to the cost price of said locomotive, car or other equipment which has become lost, worn out, destroyed or permanently withdrawn from service and said amount shall be held and retained by the Trustee until said locomotive, car or other equipment are replaced by other equipment of like character and of equal value. A certificate of the Railway Company or its duly appointed representative shall be sufficient evidence to the Trustee as to the value of the equipment destroyed and as to its replacement, and immediately upon receiving such certificate showing that the equipment destroyed has been replaced with proper plates attached showing the subjection of said equipment to this indenture, the Trustee shall repay to the Railway Company the sums deposited with it against each piece of equipment thus replaced.

### CLAUSE III

#### COVERING PAYMENTS OF PRINCIPAL AND INTEREST

The Railway Company covenants and agrees that on or before the date of maturity of any of the said notes it will deposit with the Trustee a sum sufficient for the payment of the principal and accrued interest of all the said notes falling due on that date. Out of the amounts so deposited the Trustee shall take up and pay the principal and accrued interest of the notes on that date falling due. Such payment by the Trustee shall be made to the bearer of such note (unless it shall be registered, in which case payment shall be made to the registered holder or his assigns) but only upon the surrender of such note. All unpaid interest represented by coupons which shall have matured on or prior to the maturity of the principal shall continue to be payable to the bearer

severally, and respectively of such coupons. All notes so paid by the Trustee with the moneys deposited by the Railway Company as aforesaid shall be cancelled by the Trustee and delivered to the Company and shall not be reissued.

The Railway Company covenants and agrees that when and as said notes mature as therein and herein provided, the said notes and the interest coupons shall be paid and cancelled respectively, and no notes or interest coupons in substitution therefor shall be issued, and that no purchase or sale of said interest coupons or of said notes, or advance of loans upon the same, made by or on behalf of, or at the request of, or with the privity of the Railway, shall operate to keep the said notes or said interest coupons, or any of them, alive or in force as against the holders of the other notes issued hereunder and of the interest coupons pertaining thereto, whether such other notes and interest coupons be then matured or unmatured; nor shall the Railway Company extend, or consent to the extension of, the time of payment of the principal of such interest coupon.

#### CLAUSE IV

##### COVERING CONDITIONS OF DEFAULT

The Railway shall be entitled to the possession of the equipment at all times during the life of this agreement so long as it shall comply with the conditions and fulfill the obligations hereof; but in case default shall be made by the Railway Company in the payment as hereinafter provided of the principal of any of the notes issued hereunder, or of any interest coupon, whether or not, when due and payable, demand be made for the payment thereof, and upon such default continuing for a period of thirty days, or in case default shall be made

in the due observance or performance of any other of the terms, provisions, covenants, conditions or obligations of this agreement, and upon such last-mentioned default continuing for a period of thirty days, the Trustee shall be entitled to, and at its opinion may, possess itself of the locomotives, tenders, coaches and cars composing said equipment and of every one thereof, and shall be entitled to collect, receive and retain all unpaid mileage or per diem charges earned by said equipment, and for the purpose of taking such possession the Trustee shall be entitled to enter upon and take and remove said equipment from the premises of the Railway, or wherever it shall find said equipment, and the Railway Company shall afford the Trustee every possible facility and means of assistance to such end. The Railway Company agrees that in event of any default continuing for 30 days as aforesaid it will as promptly as possible, upon demand in writing by the Trustee, deliver to the Trustee each and every car and engine at such place or places upon the tracks of the Railway Company as the Trustee shall require, and will relinquish all claims or rights in or to the same. The Trustee shall upon application to any Court of Equity having jurisdiction be entitled to a decree against the Railway requiring specific performance hereof.

As soon as said right to possession of the equipment shall begin, the Trustee may at its option, and, if requested thereunto in writing by the holders of a majority of the then outstanding notes issued hereunder, shall by written notice to the Railway Company declare the principal of all of said outstanding notes to be due and payable, and upon such declaration the same shall become and be due and payable immediately, anything in this



agreement or in said notes to the contrary notwithstanding; and the Trustee may also at its option, and if requested thereunto in writing by the holders of a majority of the then outstanding notes issued hereunder, shall sell said equipment or so much thereof as may be necessary, with or without notice to the Railway Company, either at public auction or private sale, in such manner as the Trustee may deem expedient, and with or without taking possession thereof, and apply the net proceeds of such sale, after deducting of all expenses of such sale and of possessing themselves of such equipment, all payments made by the Trustee for taxes, insurance, assessments and charges of every sort paid by the Trustee and of all charges of every nature against said equipment which properly should be paid, all expenses, including attorney and counsel fees, and the reasonable compensation to themselves for their services, to the payment *pro rata* of the then outstanding notes, and of the interest thereon, without preference of one over another or of interest over principal, or of any installment over any other installment.

No coupon appertaining to any note hereby secured which in any way, at or after maturity, shall have been transferred or pledged separate and apart from the note to which it pertains shall, unless accompanied by such note, be entitled, in case of a default hereunder, to any benefit of or from this agreement, except after the prior payment in full of the principal of the notes issued hereunder and of all coupons pertaining thereto not so transferred or pledged.

In case the Trustee shall make sale as hereinabove provided, any equipment which it may not be necessary so to sell, and any surplus of the net proceeds of sale,



shall be conveyed, transferred and paid to the Railway Company. In case the proceeds of such sale shall not be sufficient to pay all of said notes in full, the Railway Company shall be and remain liable for such deficiency; it being expressly agreed that the seizure, removal, taking away or sale of said equipment shall in no way prejudice any right or cause of action of the Trustee or the holders of the notes issued hereunder, or any of them, under this agreement.

The remedies herein, created in favor of the Trustee and of the holders of the notes issued hereunder, shall not be deemed exclusive, but shall be cumulative, and in addition to all other remedies existing at law or in equity, in favor of the Trustee and the holders of said notes. In the event of a sale made by the Trustee, as hereinabove provided, it is hereby expressly stipulated and agreed that the Trustee or holders of the notes issued hereunder may, if they so elect, become the purchasers at such sale or sales of such equipment or any thereof, and that any purchaser or purchasers of said equipment, in lieu of paying in cash the purchase price may apply and turn in any of the notes issued hereunder and unpaid towards the payment of such purchase price, reckoning and computing said notes for that purpose at a sum equal to and not exceeding that which would be payable out of the proceeds of said sale or sales to said purchaser or purchasers, as the holder or holders of said notes, for his or their just share and proportion, upon a due accounting concerning said proceeds and a due apportionment and distribution thereof, after deducting the expenses, charges and other payments connected with the trust and sale as aforesaid.

## Suggested Forms to Be Used in Reporting the Condition of Equipment

### INVESTMENT BANKERS' ASSOCIATION OF AMERICA

#### EQUIPMENT REPORT—FORM I

..... RAILROAD COMPANY

EQUIPMENT AGREEMENT SERIES .....

ORIGINAL STATEMENT OF EQUIPMENT PLEDGED UNDER TRUST AGREEMENT AND IN ACTUAL

SERVICE, DATE .....

VALUE TO BE MAINTAINED \$.....

Date of Acquisition.	Description.	Road Nos.	No. Pieces.	Cost per piece.	Total Cost.
	Totals				

New York, N. Y., ....., 1917.

I hereby certify that the foregoing statement is correct.

.....

Supt. of Motive Power.

INVESTMENT BANKERS' ASSOCIATION OF  
AMERICA

EQUIPMENT REPORT—FORM II

..... RAILROAD COMPANY

EQUIPMENT AGREEMENT SERIES .....

EQUIPMENT DESTROYED DURING SIX MONTHS

ENDING .....

Date Destroyed.	Description.	Road Nos.	Original Cost.
	Totals		

New York, N. Y., ....., 1917.

I hereby certify that the foregoing statement is correct.

.....,  
Supt. of Motive Power.

INVESTMENT BANKERS' ASSOCIATION OF AMERICA

EQUIPMENT REPORT—FORM III

..... RAILROAD COMPANY

EQUIPMENT AGREEMENT SERIES .....

EQUIPMENT BUILT OR PURCHASED TO REPLACE DESTROYED EQUIPMENT DURING SIX MONTHS

ENDING .....

Date of Acquisition.	Description.	Road No. Nos. Pieces.	Cost.	Total Value in Replacement.
	Totals..			

New York, N. Y., ....., 1917.

I hereby certify that the foregoing statement is correct.

.....

Supt. of Motive Power.

INVESTMENT BANKERS' ASSOCIATION OF  
AMERICA

EQUIPMENT REPORT—FORM IV

..... RAILROAD COMPANY

EQUIPMENT AGREEMENT SERIES .....

EQUIPMENT REPAIRED DURING SIX MONTHS AND IN  
SHOPS FOR REPAIR AND PRESENT CONDITION  
OF EQUIPMENT

DATE .....

Description.	No. Pieces Repaired.	No. Pieces in Shops and awaiting repairs.	Original Cost Equipment now in shops and Awaiting Repairs.	Total in use.	Grand Total Equipment.
Totals.					

New York, N. Y., ....., 1917.

I hereby certify that the foregoing statement is correct.

.....,  
Supt. of Motive Power.

## Suggestions to Corporations Desiring the Services of a Trust Company as Transfer Agent to Reg- ister Transfers of Stock

(Extracts from booklet published by the Old Colony  
Trust Company of Boston.)

“Corporations desiring the trust company to act in either of these capacities (transfer agent or registrar) should submit the following papers. Additional papers will be called for if required:

“(a) Certificate of incorporation of the company, certified by the Secretary of State of the state where the corporation is domiciled.

“(b) Minutes of the organization meetings of the stockholders and directors of the company, showing compliance with the necessary formalities to make the incorporation legal, such minutes to be certified by the clerk or secretary of the company.

“(c) By-laws, similarly certified.

“(d) Copies, similarly certified, of all votes, both of stockholders and directors, authorizing the issue of stock of the company, together with the certificate of the treasurer or other proper officer, stating the exact amount of stock outstanding, which was issued under each of such votes. If approval by the state is necessary in any form—e. g., by railroad commissioners—formal evidence of such approval, and generally of compliance with all conditions precedent to the issue.



“(e) If the stock is issued as fully paid, evidence that such is the case, either in the form of a certificate of the treasurer to payment in cash at par, or, if the law of the state permits payment to be made otherwise than in cash, then satisfactory proof that payment has been made in compliance therewith.

“(f) Copy of the form of stock certificate which is to be issued, and which the trust company is expected to sign. This should be submitted for approval before it is engraved.

“(g) Vote of directors certified as in (b) approving the form of stock certificate; also vote similarly certified appointing the transfer agent and agent to register transfers of the company.

“(h) List similarly certified of the officers and directors of the company, with sample signatures of such as may sign certificates.”

#### SUGGESTIONS ABOUT STOCK TRANSFERS

(Extracts from booklet published by the Old Colony Trust Company of Boston)

1. Signatures of stockholders on stock transfers, when unknown, must be verified in some way satisfactory to the transfer agent. This will usually be by guarantee of some Boston or New York stock exchange house or some well-known bank or trust company, or by acknowledgment before a notary public under seal.

2. If the holder's name is rightly given on the face of the certificate, he or his duly authorized attorney should sign the transfer exactly as the certificate is made out, without alteration or enlargement.

3. If an error was made in issuing the certificate, the transfer agent should be informed of the facts. Do

not make corrections on the face of the certificate. If the assignment is filled out erroneously, alterations should be made in ink only, leaving the original writing legible. Do not use erasers of any sort.

4. Enter in the transfer space on the back of the certificate the full name of each person to whom the stock is to be assigned, writing out the number of shares to be so transferred, and the street or post-office address of the transferee. It is essential to leave the attorney space blank, if one is provided.

5. In transferring to individuals, use the full Christian name; and, if the transferee be a woman, the title "Miss" or "Mrs." Avoid using diminutives.

6. In transfers to a married woman, use her own Christian name, not her husband's. In case of a change of name by marriage, send the stock certificate to the transfer agent with the transfer filled out to the correct name, signed after this manner, "Mrs. Mary James, formerly Mary Jones," having the signature properly verified.

7. Assignments to a corporation or association should give the complete legal title.

8. Certificates issued to a minor or an insane person should bear the guardian's name; for example, "John Jones, minor (or incompetent), under guardianship of Henry Jones." If a transfer is desired of stock so held, a recently certified copy of the guardian's appointment should be shown, together with the license of the court appointing the guardian, if such license is necessary under the laws of the state having jurisdiction. Termination of the guardianship should be shown by a certificate from the court, birth certificate, or other satisfactory evidence.

9. On certificates issued to trustees the trust must be fully described, exact reference being made to the will or other document creating the trust; and, whenever possible, the name of the beneficiary should be given.

10. Transfers by trustees, where a power of sale is not granted by the instrument creating the trust, cannot be made without license from the court or the consent of all the beneficiaries. In every case the instrument creating the trust and proper evidence of the trustee's appointment should be exhibited. If there is more than one trustee, all must sign transfers.

11. Transfers made by administrators or executors must be accompanied by a recently certified copy of court appointment. When made by executors or administrators with the will annexed, of estates which have been in probate over three years, a certified copy of the will should be shown. If there is more than one administrator or executor, a majority should sign.

12. Trustees, administrators, executors, guardians, and attorneys should not transfer to themselves individually; nor should husband and wife transfer directly from one to the other, unless such transfers are authorized by the laws of the state when the transfer is signed.

13. Transfers from corporations or associations should be executed by their officials duly authorized for the purpose, and accompanied by a certified copy of the vote or by-law authorizing the transfer. Such vote or by-law should be certified to by an official other than the one signing the transfer.

14. Transfers by attorney must be accompanied by the original or a notarial copy of the power of attorney, and evidence should be given that the signa-

ture is genuine. Powers of attorney can be recognized only when the intent of the maker to authorize transfers is beyond doubt, and when the power is recent, or is shown to be still in force.

15. Papers left for record in connection with transfers by trustees, executors, etc., will be returned.

16. Prompt notice of any change of address should be given the transfer agent in writing, stating the name of the company in which stock is held.

17. If a certificate is lost, file notice to that effect with the transfer agent at once, giving, if possible, the certificate number and number of shares.

The foregoing suggestions are subject to change, and should be considered for guidance only.

### Report of Conference of Transfer Agents and Counsel

This report is the result of a conference of transfer agents and counsel which has met from time to time since January 12, 1911, to consider the requirements in force among the corporations represented, in regard to transfers of their stock. The report is concurred in by all the members of the conference. The questions considered are answered *seriatim* and with the conclusions of the conference there is given an outline of the reasoning, or citation of the authorities, upon which such conclusions are based.

The questions considered did not include any questions under inheritance or stock transfer tax laws of any State. In addition to the requirements here recommended, inheritance and stock transfer tax laws may necessitate additional requirements which are not within the scope of this report.

## A. TRANSFER BY EXECUTORS

## I. WHAT PAPERS SHOULD BE REQUIRED?

*Answer:* In some 15 states executors have no power to sell without an order of court. Where this is the case, a certified copy of the court order should be submitted. Where no order of court is required, there should be exhibited to the Transfer Agent a certified copy of the will and a certificate showing its probate and the issue of Letters Testamentary to the executor, together with proof that the appointment is still in force.

The reasons for this requirement are as follows:

(a) The will may contain an express disposition of the stock, under which it is improper for the executor to sell the stock until after resort to the other assets (*Lowrie v. Bank, infra*).

(b) The will may create trusts which arise immediately upon the payment of all debts and legacies, so that the corporation may be under a duty to inquire whether the executorial duties still continue or have been superseded by the trusteeship (*Lowrie v. Bank, infra*).

(c) The will nearly always gives some evidence as to the testator's domicile and such evidence is of value to prevent action under a probate issue in a jurisdiction other than that of domicile.

AUTHORITIES: In *Lowrie v. Bank, Taney's Cir. Ct. Decisions, 310 (1848)*, Chief Justice TANEY stated the following rule as to the duty of a company transferring its stock to examine the will under which the transfer is made.

"The question then is, had the Bank at the time of the transfer actual or constructive notice that the executor was abusing his trust and applying this stock

to his own use. The Bank by its answer denies that it knew anything of the contents of Talbot Jones' will or of the bequest (of stock) to the complainant; and there is no proof of actual notice; but it did know that this stock was the property of Talbot Jones at the time of his death, for it so stood upon its own books; and as the transfer was made to Samuel Jones as its executor, the Bank must, of course, have known that Talbot Jones left a will. Although it may not have had actual notice of the contents of the will, yet as it was dealing with an executor in his character as such, the law implies notice. This is the doctrine in the English Court of Chancery (4 Mad. 190). And the rule appears to stand upon still firmer ground in this state; for now it is considered that every person has constructive notice of a deed for real or personal property, where it is duly registered according to law. \* \* \* Now in Maryland every will of real or personal property is required to be recorded; and if third persons are bound, at their peril, to take notice of a registered deed, when there is nothing to lead them to inquiry, the obligation must be still stronger upon one who is dealing with an executor concerning the assets of the deceased; for his character of executor, of itself, gives actual notice that there is a will open to inspection upon the public records."

"The Bank therefore was bound to take notice of the will when this transfer was proposed to be made by one of the executors; and it is chargeable to the same extent as if it had actually read it. It was negligence in the Bank not to examine it; and if it was ignorant of the contents of the will and of the specific bequest of this stock, it was its own fault."

In this case the Bank was held liable on the ground



that a reasonable inquiry and examination of the circumstances connected with the transfer would have shown clearly that the transfer was in violation of the trust created by the will. Under this decision a corporation is charged with notice of all that appears in the will whether or not a copy has been exhibited. See, also, *Marbury v. Ehlen*, 19 Atl., 649 (Md., 1890).

*Comment:* In this connection there arises a question whether the corporation should or may require that a plain or certified copy of the will be deposited in the transfer office. The committee is clearly of opinion that the corporation has no right to retain a certified copy, since the document is on record and after seeing a certified copy the Transfer Office can always obtain proof of its contents. To retain a certified copy often involves expense to the estate, whereas a plain copy will usually be furnished without objection, and should be retained in order to complete the record of the transfer.

II. CAN A CORPORATION SAFELY ALLOW AN EXECUTOR TO MAKE A DISTRIBUTION OF STOCK WITHOUT INQUIRY AS TO THE PAYMENT OF OR PROVISION FOR CLAIMS AGAINST THE ESTATE?

*Answer:* *This depends upon the statutes of each State.*

If there is a statute which expressly prohibits a distribution within a fixed period the corporation should in no instance allow a distribution unless, prior to the expiration of such period, proof is furnished that all debts and prior bequests have been paid. If there is no provision in the statutes forbidding distribution or if any such statute has been construed by the courts as intended only for the protection of the executor, then there is no obligation upon the corporation to inquire as to the

payment of or provision for claims against the estate, because

(a) There is nothing to put the corporation upon notice that any creditors or prior legatees have any interest in the stock.

(b) It must always be presumed that an executor is acting properly and has paid or provided for all debts and prior bequests unless some indication to the contrary appears. Here there is nothing to indicate that the distribution is in any way wrong.

III. WHERE AN EXECUTOR IS MAKING AN UNEQUAL DISTRIBUTION TO LEGATEES ENTITLED TO SHARE EQUALLY UNDER THE WILL, IS THE CORPORATION PUT UPON INQUIRY AS TO THE PROPRIETY OF THE TRANSFER?

*Answer: No.*

It is perfectly proper for an executor to give Steel stock to one legatee and Atchison stock of equal value to another, and Smelters stock of the same value to a third, if he and the legatees agree to this method of payment of their legacies. There is nothing to compel him to break up each block of stock into as many portions as there are legatees equally entitled. There is nothing on the face of the transaction to impute any impropriety in the transfer, because it is not necessary that legatees should always be paid in cash—they may be paid in stock if the legatees receiving the stock are satisfied to accept it. Other legatees have no right to object to such a payment so long as the valuation placed upon the stock is proper. See *Macy v. Mercantile Trust Co.*, 59 Atl., 586 (N. J. 1904), and cases cited in 11 A. & E. Enc. 1169, 22 Cent. Dig., § 1232-3; *Jessup's Surrogate's Practice*, 3d Ed., 1170.

IV. CAN A CORPORATION SAFELY TRANSFER ITS STOCK AT THE REQUEST OF AN EXECUTOR APPOINTED IN A STATE OTHER THAN THAT IN WHICH THE DECEASED STOCKHOLDER WAS DOMICILED,—for example: A dies domiciled in Connecticut where he resided. His will is probated in New York, where he did business and had property. The United States Steel Corporation, organized in New Jersey, is asked to transfer A's stock on the strength of the New York probate.

*Answer:* A corporation can not safely transfer its stock upon any probate and letters testamentary other than those of the jurisdiction in which the decedent was domiciled,—except that where original letters or ancillary letters based on domiciliary letters have been issued by the state in which the corporation is organized such letters may be recognized,—in the first case without further inquiry, and in the second upon being satisfied that the domiciliary letters upon which the ancillary letters are based were issued at the domicile of the decedent. The reasons for this conclusion are as follows:

(a) Shares of stock can be said to have their situs only in two possible places,—either at the domicile of the corporation or at the domicile of the stockholder (Plympton v. Bigelow, 93 N. Y., 660; Matter of James, 144 N. Y., 6; Matter of Bronson, 150 N. Y., 1\*). Under the general rule that the situs of personal property follows the domicile of its owner, shares of stock have their situs at the domicile of the owner, except in so far as the state in which the corporation is organized may assert its control over them by reason of its actual power

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\*These cases were distinguished in Lockwood v. U. S. Steel Corporation (1913), 209 N. Y. 375, decided since the above was written, and reversing 153 N. Y. App. 655.—J. H. S.

to control their transfer on the books of a corporation organized under its laws (I Cook on Corporations, § 12). By the comity recognized between states of the Union and between nations, it is well established that, while no one is compelled to recognize an executor acting beyond the jurisdiction which conferred his powers, nevertheless, those who see fit to recognize him will be protected, at least in any recognition made prior to demands by a local executor (11 A. & E. Enc., 997, 22 Century Dig., § 2312). We find no authorities allowing this recognition by comity to other than a domiciliary representative.

(b) There is no foundation in principle for the recognition in New Jersey of a New York executor appointed for a Connecticut decedent, because

(1) The rule that situs of personal property follows the domicile of its owner not only does not sustain, but is contrary to any such recognition.

(2) There is no basis for the exercise by the New York executor of any authority over property outside of New York. His appointment is based upon the presence of property in New York and the necessity that some one be appointed to administer it. The principle is the same where the appointment is made because the person died in the state while temporarily there. Probate is allowed on the assumption that if a person has property in the State of New York, or dies in the State of New York, while temporarily here, a New York representative may be needed to administer the property or the local affairs of the decedent.

(c) Any other rule would rapidly lead us into the utmost confusion and executors bonded on the basis of very small amounts of property might take possession of sums vastly beyond the amount of their bonds.

*Comment:* As indicated earlier in this report, the transfer agent has some evidence as to the domicile of the decedent from the recital in the will, the recital in the certificate of probate and the record of the dividend address. If all these are the same, it is pretty safe to say that the place named is the place of domicile. If they differ, or if for other reason the matter seems doubtful, affidavits or other satisfactory evidence should be demanded to establish the place of domicile.

(NOTE. This question is before the courts of New York in the case of *Lockwood v. United States Steel Corporation*.\*)

V. WHAT, IF ANY, LAPSE OF TIME AFTER APPOINTMENT SHOULD CAUSE A CORPORATION TO QUESTION AN EXECUTOR'S POWER OF SALE?

*Answer:* This question calls for different answers to different conditions of fact;

FIRST.—If the will contains no provision, either expressly or by implication, conferring upon the executor the powers or functions of a trustee, his power of sale as executor need not be questioned whatever the lapse of time since his appointment. The reasons for this conclusion are:

(a) It is always within the power of persons in any way interested in the estate to demand an accounting, and if the circumstances warrant it, to bring about a

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\*The New York Court of Appeals held in this case, as reported in (1913) 209 N. Y. 375, reversing 153 N. Y. App. Div. 655, that the fact that the Steel Corporation of New Jersey maintained a transfer agency in New York constituted New York the domicile of the corporation, so far as the registry and transfer of shares therein are concerned—and that the *situs* of the stock was not confined to two possible places—either at the domicile of the corporation or at the domicile of the stockholder, as argued in the above report. The plaintiff, who was acting under ancillary letters for a decedent of Bermuda, was held entitled to enforce a transfer of stock belonging to the estate in the New York Courts. See 218 N. Y. Mem. 12 and 578 of this book, *supra*.—J. H. S.



termination of the executorship. If they fail to take the remedy given them by law, it does not seem that they would be permitted to hold a corporation liable for continuing to recognize as executor one whom they had allowed to continue in that capacity.

(b) Since it is the duty of an executor to sell stock and wind up the estate, all that appears when the stock is presented to the corporation for transfer is that he is tardily doing his duty. On principle it does not seem that the corporation should prevent him from doing his duty merely because of his tardiness in doing it. There is no more reason to assume that he is going to misappropriate the proceeds of the sale after he has been executor for ten years than when he has only been executor for two years. On the contrary, it would rather seem that the persons interested in the estate have entire confidence in him or they would already have required him to account.

SECOND. *Frequently the executor is also trustee. In such cases he is generally so styled, but the function of trustee as distinguished from the ordinary function of executor may arise by virtue of any provision which requires the executor to retain the estate or a part thereof in his hands for the purpose of accumulating or applying income. In all such cases inquiry as to the capacity in which he is acting should be made after the lapse of a reasonable time, say eighteen months from the issue of letters.*

Where the two functions of executor and trustee are vested in the same person a formal accounting or transfer from the executor as such to himself as trustee is not essential to terminate the powers and functions of the executor and reveal those of the trustee. When the



purpose for which the peculiar powers of an executor are conferred by law has been accomplished, those powers cease and the powers and functions of a trustee appear. If after the lapse of a time ordinarily adequate for the settlement of an estate, an executor seeks to exercise the powers of an executor as distinguished from those of a trustee, persons dealing with him are put on inquiry to ascertain that the facts and his purpose justify a continuance of the exercise of such powers. Before the lapse of such time it may ordinarily be presumed that he is acting in the ordinary course of administration and settlement of the estate, and is entitled to exercise the powers of an executor.

Each case, however, must be treated on its own merits: For instance, if the will require that the trustee retain as an investment of the trust fund, or for ultimate distribution in kind, the very securities owned by the testator, special justification for the sale of any of them must be shown, no matter how short a time may have elapsed since the issue of letters.

VI. MAY A CORPORATION WITH SAFETY ALLOW STOCK OF AN ESTATE TO BE TRANSFERRED TO AN EXECUTOR INDIVIDUALLY?

*Answer:* Securities of the estate should not be transferred into the name of an executor individually in any case unless (1) he is a legatee under the will and (2) there is proof that all of the testator's debts have been paid or provided for.

(a) If such executor is sole legatee, no other inquiry need be made.

(b) If there are other legacies, proof that they have been paid or provided for should be required.

(c) *If such executor is one of several residuary legatees, proof should be required either that there is being transferred to him only his proportionate share of the particular sort of security, or that all other residuary legatees assent to the transfer.*

(d) *Where there are several executors and that one to whom the stock is to be transferred does not join in the assignment, the transfer may be made upon proof that debts and other legacies have been paid or provided for.*

(c) *Where all executors are required to sign, the situation is the same as that of a sole executor. Where the executor to whom the transfer is made is not required to sign, his signature may perhaps be regarded as surplusage and transfer made as if he had not signed with his co-executors.*

A transfer by an executor to himself would seem to put the corporation upon notice and to require some inquiry under the rule in equity that such acts of a fiduciary by which he benefits are *prima facie* voidable. The inquiry required of the corporation should be such as to show that the transfer is in accordance with the provisions of the will.

## B. TRANSFER BY ADMINISTRATORS

### I. WHAT PAPERS SHOULD BE REQUIRED?

*Answer: There should be exhibited to the transfer agent either the Letters of Administration or the customary short certificate showing the issue of such Letters, together with proof that the appointment is still in force. If the administrator is appointed in a state where executors and administrators have no power to*

*sell without an order of court, a certified copy of the court order should be submitted, in which case it is the only document that need be required.*

II. CAN A CORPORATION SAFELY ALLOW AN ADMINISTRATOR TO TRANSFER ITS STOCK UPON A DISTRIBUTION WITHIN THE STATUTORY PERIOD?

*Answer: The rule here is the same as in the case of an executor, to wit, this cannot safely be allowed if the statutes prohibit a distribution. If the statute is merely for the protection of the administrator against being compelled to account within the statutory period, then a distribution may be allowed.*

III. WHEN THE DISTRIBUTION IS MADE AFTER THE EXPIRATION OF THE STATUTORY PERIOD, MAY IT BE ALLOWED WITHOUT QUESTION?

*Answer: Yes.*

There is no ground, either on principle or precedent, for challenging a distribution after the expiration of the statutory period. On its face it appears to be exactly what the administrator ought to do, and his actions are presumed to be proper unless there is something to put the corporation on notice.

IV. IF THE ADMINISTRATOR APPEARS TO BE MAKING AN UNEQUAL DISTRIBUTION, IS THE CORPORATION REQUIRED TO DEMAND ASSURANCES THAT THE UNEQUAL DISTRIBUTION OF ITS STOCK IS EQUALIZED FROM OTHER ASSETS?

*Answer: No.*

The administrator may either convert all the assets into cash and distribute the cash in accordance with the interests of the various heirs, or he may distribute the securities *pro rata*, or he may pay some in cash and some

in securities. Since all of these courses are proper, there is nothing to put the corporation upon inquiry even though he appear to be dividing the stock unequally or is giving it all to only one of the beneficiaries.

V. DOES LAPSE OF TIME MAKE IT ADVISABLE FOR A CORPORATION TO QUESTION AN ADMINISTRATOR'S POWER OF SALE?

*Answer: No.*

The rule here should be the same as that in the case of an executor who has no powers or functions of a trustee under the terms of the will. The reasons given in that case apply equally to this.

VI. WHERE LETTERS OF ADMINISTRATION HAVE BEEN ISSUED IN A STATE OTHER THAN THAT IN WHICH THE DECEDENT STOCKHOLDER WAS DOMICILED, HAS THE ADMINISTRATOR THUS APPOINTED A RIGHT TO TRANSFER STOCK IN A CORPORATION ORGANIZED IN A STATE OTHER THAN THAT IN WHICH THE LETTERS WERE GRANTED?

*Answer: No.*

This is governed by the same principles that were stated in considering the question of an executor appointed in a state other than that of the domicile of the decedent or the corporation.

VII. MAY A CORPORATION SAFELY ALLOW STOCK OF AN ESTATE TO BE TRANSFERRED TO AN ADMINISTRATOR INDIVIDUALLY?

*Answer: Securities of the estate should not be transferred into the name of an administrator individually in any case unless he is one of the next of kin and there is proof that all of the decedent's debts have been paid or provided for.*

*(a) If the administrator is the sole next of kin, no other inquiry need be made.*

(b) *If the administrator is one of several entitled to share in the estate, proof should be required either that he is transferring to himself only his own proportionate share of the particular sort of security, or that all the other next of kin assent to his act.*

The reasons for this conclusion have been stated already under the question of transfer to an executor individually.

### C. TRANSFER BY TRUSTEES

#### I. WHAT PAPERS SHOULD BE REQUIRED?

*Answer: If the trust instrument is recorded, a certified copy should be exhibited to and a plain copy filed with the transfer agent. If the trust instrument is not recorded, the original should be shown to and a copy filed with the transfer agent.*

II. WHERE A TRUSTEE IS GIVEN POWER TO INVEST, MAY THE CORPORATION ALLOW HIM TO SELL STOCK UNDER SUCH POWER?

*Answer: No, unless there are other clauses or some special circumstances which would make the power "to invest" sufficient to create an implied power of sale.*

Reasons: (a) The conclusion that the word "invest" does not in general include a power of sale is based upon the principle that a trustee ordinarily has no power of sale unless such power is given him in the trust instrument either expressly or by necessary implication. See *Geyser-Marion Gold Mining Company v. Stark*, 106 Fed. 558 at 561; *Garesche v. Lovring Company*, 48 S. W. 653 at 655. The power to invest, standing alone, clearly does not carry with it a power of sale, either express or by implication. See *Hatt v. Hagaman*, 12 Misc. 171; *Halloway v. Halloway*, 60 L. T. R. at 46, and

a dictum to the same effect in the opinion in *Duncan v. Jandon*, 15 Wallace 165. There are one or two decisions which look the other way, but they seem of insufficient authority for the recognition of any such power. They are: *Owsley v. Eads, Trustee*, 57 S. W. 225 (Ky., 1900) for and against *Newsom*, 50 S. E. 597 (N. C., 1905); *Crawford v. Wearne*, 20 S. E. 72 (N. C., 1894). Possibly *Yerkes v. Richards*, 32 Atlantic 1089 (Pa., 1895) might be considered as an authority for implying such a power.

(b) There is one situation, however, where the power to invest would seem of necessity to carry with it a power of sale. Where a trust is created by designating certain specific securities to constitute the *trust res* and a power or direction "to invest" is conferred upon a trustee, there would seem to be implied a power to convert *once* the securities in cash and invest the proceeds. Otherwise, the words have no meaning at all. The power cannot be limited to the investment of securities as they mature, for that is a duty which the trustee must perform in any event. It seems, however, that one exercise exhausts the power if it rests on the mere presence of the word "invest."

III. WHERE A TRUSTEE HAS POWER "TO INVEST AND REINVEST" MAY THE CORPORATION ALLOW HIM TO SELL STOCK UNDER SUCH POWER?

*Answer: Yes.*

Whether stock stands in the name of the decedent or has been purchased by the trustee, in either case it is impossible for the trustee to exercise the power to invest and reinvest without a sale of the stock. One cannot invest or reinvest shares of stock. Money or its equivalent is the only thing that can be invested and reinvested.



Therefore the exercise of the power to invest and reinvest involves a conversion into money. It is no answer to say that these words apply only to moneys received on creation of the trust or from the maturity of investments already made. Were that so, the words would be useless, since the law alone implies a power to invest cash received and later to reinvest it if it again comes in.

IV. WHERE THE TRUSTEE IS GIVEN GENERAL POWER "TO MANAGE" THE TRUST FUND, IS THERE AN IMPLIED POWER OF SALE?

*Answer: If the power to manage is general and is applied to a fund, it implies a power of sale.*

So long as stocks are retained no other action is ordinarily required than the collection of dividends and the exercise of voting power which would hardly be described as management, therefore the power "to manage" stocks would appear meaningless if it does not imply a power to sell.

If, however, the word is applied to specified securities, the testator's intent to preserve the particular investment would appear to be controlling, even though it compels the abandonment of the ordinary meaning of the word "manage." Even then, a power to manage might imply a power to sell, if attached to the trust fund as such or if enumerated among the trustee's powers generally.

By way of comment it may be remarked that the power to manage is often coupled with the words "to control," and a number of decisions sustain the implication of a power of sale from the power "to manage and control." See *Spencer v. Weber*, 26 A. D., 285, affirmed 163 N. Y., 493; *Washburn v. Benedict*, 46 A. D., 484; *Dillaye v. Commercial Bank*, 51 N. Y., 345.

V. WHERE A TRUSTEE HAS AN UNAUTHORIZED INVESTMENT IN STOCK, CAN THE CORPORATION SAFELY ALLOW HIM TO SELL THE STOCK?

*Answer:* This situation has two different aspects, —first, where the trustee is expressly given a power of sale; and, second, where the trust instrument does not expressly give the trustee power of sale. In both cases the corporation can safely allow a sale of its stock on the following reasoning:

(a) Where the trustee has no express power of sale.

The law imposes upon the trustee a duty to dispose of securities which are not proper trust investments as promptly as possible and all that appears upon a sale of stock by a trustee who has purchased it without authority is an apparent intention to do what the law requires him to do. On principle it seems that the corporation should facilitate the doing of what the trustee is by law required to do. In fact, if the corporation should prevent a sale and the trust estate should sustain a loss by reason of improper investment, it seems probable that the corporation would be liable for the loss: *Toronto General Trusts Co. v. C., B. & Q.*, 64 Hun 1; affirmed 138 N. Y. 657. In other words, it would seem that the trustee has an implied power of sale under such circumstances in order to enable him to convert improper securities into cash and to invest the trust fund properly.

(b) Where the trustee has an express power of sale.

All the reasons which lead to the conclusion that such a sale should be permitted even when the trustee has no express power of sale are more than ever cogent in case the instrument gives a power of sale.

## D. TRANSFER BY GUARDIAN

I. WHAT GENERAL REGULATIONS SHOULD A CORPORATION ENFORCE IN REGARD TO A TRANSFER OF STOCK BY GUARDIANS?

*Answer: Powers of guardians depend so much upon state laws that it seems unwise to act without ascertaining the law of the state in which the guardian was appointed.*

It would seem clear that the corporation cannot safely allow a guardian to exercise any powers greater than those given him by the law of the state under which he is appointed.

## E. TRANSFER TO AND BY LIFE TENANTS

I. IN CASE OF TRANSFERS OF STOCK TO PERSONS WHO HAVE ONLY A LIFE INTEREST THEREIN SHOULD THE STOCK BE REGISTERED IN THE NAMES OF SUCH PERSONS "AS LIFE TENANTS"?

*Answer: Yes.*

As a general rule the interest of a life tenant is a very limited one and he is entitled only to income and has no power of disposition over the property. The authority of an executor to transfer the property to the life tenant is always one which may be doubted. Nevertheless, the courts, especially in New York, have held that the terms of the will may indicate such an intention on the part of the testator as to warrant the executor turning over the property to the life tenant (*Smith v. Van Ostrand*, 64 N. Y., 278). Whether that be the case or not, if the corporation insists on registering the stock in his name "as life tenant," the interests of the remainderman are protected, because in any attempt at transfer of the stock by the life tenant he will be allowed to

exercise only such powers as he can clearly show to be given him under the instrument. In other words, he is treated exactly like a trustee.

It seems best that the stock be issued with the words "Life tenant under will of John Doe" (or otherwise as the case may be) after the name of the life tenant.

II. IF THE LIFE TENANT IS EXPRESSLY GIVEN A POWER OF SALE UNDER THE INSTRUMENT CREATING HIS ESTATE, SHOULD THE STOCK NEVERTHELESS BE REGISTERED IN HIS NAME "AS LIFE TENANT" AND NOT IN HIS NAME INDIVIDUALLY?

*Answer: Yes.*

If the stock is registered in the name of the life tenant individually, there takes place at that time an extinction of the remainderman's interest which amounts to a conversion unless the action of the life tenant is within his rights. The remainderman can make a case merely by proving the transfer and the corporation must assume the burden of proving that the transfer was proper—perhaps years after the transfer was made.

In case the life tenant makes no disposition of the stock there may be much difficulty after his death in identifying it for the remainderman.

The corporation should not issue a certificate which might mislead by stating that the life tenant is the individual owner of the stock.

The Committee again calls attention to the fact that the questions above considered do not include any questions under inheritance or stock transfer tax laws of any State. In addition to the requirements here recommended, inheritance and stock transfer tax laws may necessitate additional requirements which are not within the scope of this report. The limitations of this

report have also precluded any consideration of transfers to and by corporations, transfers to and by attorneys in fact and of questions concerning the authentication of signatures.

### Instructions to Transfer Department as to Transfer Requirements

The following regulations were compiled by John A. Burns and have been adopted by the Columbia Trust Company of New York. See "Trust Companies" Magazine for June, 1916, pages 561-563.

#### EXECUTORS, ADMINISTRATORS OR FIDUCIARIES

For transfers to executors or administrators as such, from a decedent or otherwise, require a probate certificate of recent date to be kept on file; New York waiver and waiver of the State in which the company is incorporated, if required. (Look up "Summary of Inheritance Tax Laws.")

For transfers to trustees, require a certified copy of the will, or of the instrument creating the trust, to be kept on file. Insist on definite description of the trust and describe it fully on the certificate. If we are furnished with an uncertified copy of the will or a trust agreement, and are permitted to compare it with a certified copy or an original instrument, it is not necessary to retain the certified copy or original for our files. Certified copies of court orders or of appointment or qualification of fiduciary should be kept on file in all cases as should waivers or consents respecting inheritance tax.

For transfers to committee of property, guardian,

etc., require a certified copy of appointment to be kept on file.

Transfers to corporations or joint tenants may be made without requiring anything except a name which will leave no doubt as to the status of the registered owners. No transfers should be made to joint tenants or tenants in common with any provision as to the survivor, as the New York State law requires that before title to the property of tenants in common may pass to the survivor, the payment of inheritance tax on that part of the estate owned by the decedent and the consequent probate of his estate. Endeavor to comply with the foregoing requirements before issuing stock, but do not refuse to issue stock in any name without referring to counsel.

#### TRANSFERS FROM EXECUTORS OR ADMINISTRATORS

For transfers from executors or administrators as such or from the name of the decedent to others than the executor or administrator as such, look up files and see what papers we have received. Before completing the transfer we should have a copy of the will, probate certificate dated not more than sixty days prior to the date of transfer in question, and tax waivers. If no specific bequest is made of the stock, and no trusts are created by the will, there is no objection to transfers to any names other than to the executors or administrators individually. If specific bequests of the stock are made in the will, we can transfer only in accordance with the will, except under order of court. If no specific bequests are made, but trusts are established, it is inadvisable to transfer stock to the names of any of the heirs, but it is usually satisfactory to us to have the



stock transferred to the name of any person other than the executor or administrator personally, an heir or a beneficiary named in a trust, providing power of sale is given to the executors under will. In the absence of any provision prohibiting it, the power of sale by executors is implied.

We are advised to make no transfers to executors or administrators individually, unless the stock is specifically bequeathed to them by the will, or we are furnished with a court order authorizing the transfer, or a certified copy of a final accounting showing the stock in question to be part of their share of the estate.

If fiduciary is sole beneficiary and the time for filing claims against the estate has elapsed we may accept letter from attorney for the estate or affidavit of fiduciary stating that the time for filing claims has expired and that no appeal is pending with respect to the order of his appointment and that all debts have been paid or provided for.

#### TRANSFERS FROM TRUSTEES, EXECUTORS OR GUARDIANS

Before making transfers from trustees, executors or guardians, the extent of their authority should be looked up in "Stock Transfer Guide," and we should accept their acts only when unrestricted by the State in which they have qualified. We are not obliged to concern ourselves respecting inheritance taxes imposed by the State in which the decedent died, unless it is New York State, or the State in which the company in question is incorporated. In the absence of any specific limitations, it is implied that one executor has power to act for all. In the same manner it is implied that all

trustees must act. Care must be exercised in transferring stock under a will in which trustees are appointed, to see that the executors have not been replaced by the trustees, and that they are signing in accordance with the will. The usual time for this substitution to take place is about 12 to 18 months after the probate of the estate. If the executors named are not also named as trustees, we should require proof that the executors are still acting. It is possible where persons are named both as executors and trustees for one or more of them to fail to qualify as executors, but they should all act as trustees unless other persons are substituted by the courts. A court order is sufficient authority on which to act without requiring a certified copy of the will or any other instruments except waivers.

When stock is presented for transfer standing in the name of fiduciaries concerning which we have no information in our files and claim is made that the trust is made for convenience only and is not expressed by any written agreement, we should take no action until we are satisfied as to the facts. We must in no case refuse to make transfer except at the direction of the company for which we act. It is usually advisable to refer to counsel. If the advice of the company's counsel in the matter does not seem to us to be in accordance with the best practice, it may be desirable to refer the matter to our own attorneys, lest we subject ourselves to liability.

#### GENERAL REQUIREMENTS

Transfers by corporation should be signed by the proper officers under seal, and we should be furnished with a certified extract from the by-laws showing what officers are authorized to assign securities, and a certi-

fied extract from the minutes showing the election of such officers. Certifications by the officer authorized to sign which are not attested by some other officer are not satisfactory.

Stock standing in the name of brokers or brokerage firms that we know to be insolvent or bankrupt should not be transferred even when dated prior to their failure, unless we are furnished with a statement guaranteed by persons satisfactory to us, that someone other than the firm in question or their receivers was the owner of the stock at the time of their bankruptcy, and that the bankrupts had no interest in the stock at that time or at any time since. Watch carefully that statements are not accepted saying that the stock was "held by ....." at the time of the firm's assignment, instead of "Owned by ... .." etc. In the absence of this statement we should be furnished with a statement from the receivers or trustees in bankruptcy that they have no interest in the stock or the certificate should be endorsed by them in the trust capacity.

#### TRANSFERS MADE BY ATTORNEY-IN-FACT

On transfers made by an attorney-in-fact we should be permitted to examine the original instrument or copy certified by recording officer in the case of general powers of attorney, but in the event that the power of attorney covers only the transfer of stock in question, the original should remain in our files. Copies may be substituted in files for the original or certified copies in any other cases. Powers of attorney should be of recent date or bear the statement of a responsible party or recording officer that they are still in force and should not be accepted in any

event after we are informed of the death of the maker.

Endorsements not known to us should be guaranteed by banks having New York correspondents or by New York Stock Exchange firms only, except in cases where we have been authorized to accept other guarantees by the company for which we act. Signatures of out-of-town banks should be verified at the office of the New York correspondent. Guarantees of firms who have changed their name or dissolved may be accepted if assignments are dated prior to such change. Guarantees of firms that are insolvent must be refused in all cases.

Duplicates in lieu of lost or destroyed certificates may be issued only upon bond of indemnity of a responsible Surety Company for twice the par value of the stock if the market value is below par, or twice the market value of the stock if above par. Bond to indemnify the company whose stock we transfer . . . . . Trust Company and the Registrar.

#### SUFFICIENCY OF SURETY BOND

Great care should be exercised in passing upon the sufficiency of a surety bond. The description of the securities lost should be accurate in all respects, and the usual five-year term clause in the bond should be stricken out so that the period over which the bond is to run is unlimited. A bond of indemnity usually requires immediate notice to the Surety Company. If possible, have the bond provide a reasonable length of time, but not a specified time, which might lapse and render the bond invalid. It is advisable to follow the printed forms adopted by the trust company, and in all cases it is safer to have the form approved by counsel.

Authority of the New York Stock Exchange must be obtained before issuing duplicate certificates for listed stock. The Stock Exchange should be provided with certified copy of a resolution of the company authorizing the issuance of a duplicate certificate, and our statement that such certificate has been issued so that they may authorize the resignation of such duplicate.

#### STOP TRANSFER AND DIVIDEND ORDERS

Stop transfer orders should be entered on our books only upon written request of the holder of record or of responsible firms, individuals or company, and if stock on which such notice has been given should be presented to transfer, we should advise interested parties at once and make no transfer except by advice of counsel. We should in no case refuse to make transfer without such advice. Dividend orders must be signed by the holders of record and their signatures properly authenticated, except where dividends are to be paid to responsible banks for account of the holders of record. Addresses should be changed only upon written request of the company, the holder of record or banks or stock exchange firms.

#### TRANSFER TAXES

New York State transfer tax at the rate of two cents (2c) per \$100 par value is required on all transfers, or at the rate of two cents (2c) per share on stock having no par value, except transfers from decedents to their executors or administrators or from trustees to substituted trustees.

All questions arising with reference to New York,

Pennsylvania or Massachusetts taxes should be looked up in the rulings of the State Comptrollers, published by the respective States and questions regarding Federal tax in the 'War Tax Service.' ”



## Laws, Rulings and Opinions Relating to the Admission of Foreign Trust Companies to Do Business in the Various States

### Alabama

Code of Alabama, 1907, section 3530, provides that no trust company which has not complied with sections 3528 and 3529, making such companies amenable to the banking laws and requiring certain amounts of paid-up capital, shall use the word "trust" as a part of the corporate name.

The general foreign corporation laws (Sections 3640-3651) requiring the filing of a copy of the articles of incorporation, the appointment of a process agent, payment of certain fees, apply in terms to every foreign corporation doing business in the state. Application of these provisions to a foreign trust company, acting as mortgage trustee, is discussed in section 133 of this book.

### Arizona

"Any company incorporated under the laws of any other state, territory, or any foreign country, which shall carry on, do, or transact any business, enterprise or occupation, in this state, shall before entering upon, doing or transacting such business, enterprise, or occupation in this state" (Revised Statutes, 1913, Par. 2229 *et seq.*) file a copy of its charter with the corporation commission and publish a copy of the same, appoint a

process agent, and pay certain fees, etc. A New York trust company acting as trustee of a corporate bond issue with respect to property located in Arizona, is not required by that fact alone to qualify under this law. The trust deed in this case was accepted, executed and acknowledged in New York. The only activity of the trust company in Arizona was a suit for foreclosure. Prosecution of such a suit is not "doing business." Even if it were, it would be an "isolated transaction," and therefore exempt. *Martin v. Bankers' Trust Co.* (1916), 156 Pac. 87.

### Arkansas

"The banking law has no specific provision in regard to foreign trust companies acting as trustee for parties in this state. The general laws of Arkansas would prevail in matters of this kind." (Letter of Nov. 20, 1916, from Bank Commissioner, State Banking Department, City of Little Rock.)

The general foreign corporation law (Act 313, Acts of 1907) applies in terms to all foreign corporations.

### California

Section 90 of the Banking Law, approved March 1, 1909, provides as follows:

"No foreign corporation shall have or exercise in this state the power to act as trustee under any mortgage, deed or trust, or other instrument securing notes or bonds issued by any corporation, excepting that a foreign corporation may be authorized to act, outside of the state of California, as co-trustee with any qualified trust company organized and doing business under the law of this state, for the following purposes with

reference to bonds secured by mortgage or deed of trust of property in this state, and none other:

- (1) To deliver bonds, and receive payment therefor.
- (2) To deliver permanent bonds in exchange for temporary bonds of the same issue.
- (3) To deliver refunding bonds in exchange for those of a prior issue or issues.
- (4) To register bonds, or to exchange registered bonds for coupon bonds, or coupon bonds for registered bonds.
- (5) To pay interest on such bonds, and to take up and cancel coupons representing such interest payments.
- (6) To redeem and cancel bonds when called for redemption or to pay and cancel bonds when due.
- (7) The certification of registered bonds for the purpose of exchanging registered bonds for coupon bonds. (Amendment approved May 6, 1913; Stats. 1913, p. 175.)

Section 7 pertains to the powers of executors, administrators, guardians, etc., and reads in part as follows:

"No foreign corporation shall have or exercise in this state the power to receive deposits of trust moneys, securities, or other personal property from any person or corporation or any of the powers specified in section six of this act, nor have or maintain an office in this state for the transaction of, or transact, directly or indirectly, any such or similar business, except that a trust company incorporated in another state may be appointed and may accept appointment and may act in this state as executor of or trustee under the last will and testament of any deceased persons, upon giving the bond required in such case of individuals unless waived by the last will and testament making such appointment

and by taking and subscribing an oath for faithful performance of such trust by the president, vice-president, secretary, manager or trust officer of said corporation; provided, that similar corporations organized under the laws of this state are permitted by law to act as such executor or trustee in the state where such foreign corporation was organized; and provided, further, that such superintendent of banks, for the time being, shall be the attorney of such foreign corporation qualifying or acting in this state as such executor or trustee, upon whom process against such foreign corporation may be served in any action or legal proceeding against such executor or trustee, affecting or relating to the estate or property represented or held by such executor or trustee, or any act or default of such foreign corporation in reference to such estate or property, and it shall be the duty of any such foreign corporation so qualifying or acting to file in the office of said superintendent of banks a copy of its articles of incorporation, or of the statute chartering such corporation, certified by its secretary under its corporate seal, together with the postoffice address of its home office, and a duly executed appointment of said superintendent of banks as its attorney to accept service of process as above provided, and said superintendent of banks, when any such process is served upon him, shall at once mail the papers so served to the home office of such corporation; and provided, further, that no foreign corporation having authority to act as executor of or trustee under the last will and testament of any deceased person shall establish or maintain, directly or indirectly, any branch office or agency in this state, or shall in any way solicit, directly or indirectly, any business as executor or trustee therein, and that for any violation of this proviso, the court having jurisdiction of such executor or trustee in said proceeding may in its discretion, revoke the right of such foreign corporation thereafter to act as executor or trustee therein; provided, that nothing in this

act shall limit or affect the right of any foreign corporation doing a banking business in this state, to lend within this state, moneys of such corporation which do not form a part of the money, deposits or assets of such corporation assigned or belonging to its business in this state. (Amendment approved May 6, 1913; Stats. 1913, p. 137.)”

### Colorado

The general foreign corporation laws (Revised Statutes, 1908, sections 916 *et seq.*) apply in terms to every foreign corporation doing business in the state.

### Connecticut

#### General Restriction.

“Any foreign corporation may purchase, hold, mortgage, lease, sell and convey real and personal estate in this state for its lawful uses and purposes, and such real estate and other property as it may require, by way of foreclosure or otherwise, in payment of debts due such corporation; *but no foreign corporation belonging to any of the classes excepted in section 62 of this act shall engage in or continue, in this state, the business authorized by its charter or the laws of the state under which it was organized, unless empowered so to do by some general or special law of this state, except for the purpose of carrying out and renewing existing contracts heretofore made.*” (Chap. 194, Public Acts of Comm. 1903, Sec. 81.)

Section 62 here referred to is as follows:

“Any three or more persons may associate to form a corporation under this act for the transaction of any lawful business. Such corporation shall not have power, however, to transact in this state the business of a bank, savings bank, *trust company*, building and loan association, insurance company, surety or indemnity company, railroad or street railway company, telegraph or telephone company, gas, electric light, or water com-

pany or of any company requiring the right to take and condemn lands or to occupy the public highways of this state, but shall have power to transact such business in any state or territory of the United States or in any foreign country, if not prohibited by the laws of such state or territory or foreign country."

#### **Power to Act as Executors or Trustees Under Wills.**

"Any foreign corporation authorized by its charter to act as executor or trustee in the state where it is chartered, and named as executor or trustee in the will of any resident of this state, may qualify and act as such executor or testamentary trustee in this state." (Public Acts of 1903, Chap. 131, Sec. 1.)

"No such corporation shall act in such capacity until it shall have appointed in writing the secretary of the state and his successors in office to be its attorney, upon whom all process in any action or proceeding against it may be served; and in such writing such corporation shall agree that any process against it which is served on such secretary shall be of the same legal force and validity as if served on the said corporation, and that such appointment shall continue so long as any liability remains outstanding against the corporation in this state." (Public Acts of 1903, Chap. 131, Sec. 2.)

"The court of probate having jurisdiction may, in the discretion of said court, require said corporation to give bond for the performance of such trust, unless otherwise provided in such will." (Public Acts of 1903, Chap. 31, Sec. 3.)

"This act shall take effect from its passage, and shall apply to all wills and codicils which have been or shall hereafter be executed." (Public Acts of 1903, Chap. 131, Sec. 4.)

#### **Delaware**

The general foreign corporation laws requiring a foreign corporation to file a certified copy of its charter,



name its authorized agent in the state and file a sworn statement of assets and liabilities, applies in terms to all foreign corporations. (Laws of 1915, Chap. 106, Sec. 188; see also Constitution, Art. IX, Sec. 5.)

The Banking Laws (Chap. 330, Vol. XXII) subject trust companies "doing business in this state" to supervision by the Insurance Commissioner (Sec. 1) and require the filing of reports with him (Sec. 2). Trust companies "doing business" in the state are also required to pay a franchise tax. (Vol. XXIV, Chap. 46.)

### Florida

"No corporation organized to conduct either a banking or trust business or any part of such business shall engage in either the banking or trust business or any part thereof unless or until such corporation shall have complied fully with the banking and trust laws of this state and shall have been authorized by the Comptroller of the state of Florida in the manner provided by law to engage in any such business in this state. Provided, that this section shall not be construed as applying to banking associations organized within this state pursuant to the provisions of Congress to procure a national currency." (Laws of Florida, Chap. 6426, Sec. 10.)

### Georgia

"I know of no law that would prevent a foreign trust company acting as trustee of property located in this state. In order for them to do so, of course, it would be necessary for them to comply with the laws of this state in reference thereto. Our laws relative to trusts is embodied in our Code, sections 3728 to 3795

inclusive." (From letter of State Treasurer, quoting Assistant Attorney General, Nov. 23, 1916.)

### Idaho

There are no specific provisions for the authorization or admission of foreign trust companies. The general foreign corporation laws, Revised Codes of 1907, section 2792, as amended by laws of 1915, chapter 124, relate in terms to "foreign corporations not created under the laws of this state" doing business in the state.

### Illinois

Foreign trust companies cannot act as trustees of property in Illinois, unless they qualify with the Banking Department under the Trust Company Act. It is first necessary to qualify as a foreign corporation through the Secretary of State's office and then apply to the Auditor of Public Accounts at Springfield, for authority to accept and execute trusts. A deposit must be made. (From letter of Auditor of Public Accounts, Nov. 20, 1916.)

### Indiana

The general foreign corporation laws (Sections 4085 et seq. of Burn's Annotated Statutes) requiring the filing with the Secretary of State of an application, a copy of the charter, interrogatories and answers, affidavit, resolution of directors assenting to service of process upon the auditor of state, the payment of certain fees, etc., applies in terms to foreign corporations for profit, other than insurance, building and loan companies and surety companies.

Section 2988, Revised Statutes, 1881, states that

"It shall be unlawful for any person, association, or corporation to nominate or appoint any person as trustee in any deed, mortgage, or other instrument in writing (except wills) for any purpose whatever, who shall not be, at the time, a *bona fide* resident of the state of Indiana; and it shall be unlawful for any person who is not a *bona fide* resident of the state, to act as such trustee. And if any person, after his appointment as such trustee, shall remove from the state, then his rights, powers and duties as such trustee shall cease, and the proper court shall appoint his successor pursuant to the provisions of the act to which this is supplemental." This act was held to be unconstitutional in a case involving an individual non-resident trustee, *Roby v. Smith* (1891), 131 Ind. 342, 30 N. E. 1093, 31 Am. St. Rep. 439, 15 L. R. A. 792. This decision quoted with approval a statement of constitutional objections from a case involving a foreign trust company, *Farmers Loan & T. Co. v. Chicago, etc., R. W. Co.* (1886) 27 Fed. 146. See also *Shirk v. La Fayette* (1892), 52 Fed. 855.

### Iowa

A letter was addressed to the Auditor of State, Des Moines, asking the following questions: (1) May a foreign trust company act as trustee of property located in Iowa? (2) If so, what prerequisites must it observe before taking title? (3) Are there any prerequisites for a foreign trust company entering upon the duties of an executor, administrator, guardian or conservator of an estate located in Iowa?

In reply the following was received under date of Nov. 21, 1916:

"I have your letter of the 17th inst. and have sub-

mitted the same to our Attorney General, who advises that a foreign trust company, in order to enjoy the privileges of the trust act, must organize under the provisions of the Banking Act."

### Kansas

"On the question of the right of a trust company, organized under the laws of a foreign state, to be admitted to do business in this state, I wish to make the following observations:

"The general rule of law is that a corporation has no right to exist beyond the limits of the sovereignty by which it is created.

"By virtue of the comity that exists between nations and states, corporations organized under the laws of one are permitted to exercise their functions and transact business in others, subject to the well known principle that, when in another state or sovereignty they must conform to its laws and be in accord with the domestic policies of the one giving them protection for the time being.

"If a foreign corporation, in its organization, contravenes the laws or policies of another state, it cannot, of course, rightfully be permitted to do business therein.

"To render it certain that foreign corporations, seeking the right to do business in this state, are in accord with our laws and the general policy of conducting business as deduced therefrom, an application must be first submitted to the charter board asking permission to enter the state, and there must be set forth in the application the full nature of the business in which the applicant purposes to engage. (Sec. 1332, General Statutes, 1905.) If the board shall determine that the applicant 'is organized for a purpose for which a domestic corporation may be organized in this state, the application shall be granted.' (Sec. 1335.)

"But the foreign corporation authorized to do busi-

ness in this state 'shall be subject to the same provisions, judicial control, restrictions and penalties *except as therein provided*' as domestic corporations.

"I think that it was clearly the intention of the legislature in enacting a law authorizing the organization of trust companies to restrict the operation of such companies to those only organized under domestic laws.

"The first section of the act (Sec. 1526, General Statutes, 1905) provides that any trust company theretofore or thereafter incorporated in the general incorporation laws of Kansas might enjoy 'all the privileges named' \* \* \* 'by complying with the requirements of this act.'

"Section 1528 requires any trust company, which shall receive deposits, to keep on hand at all times 25 per cent of the deposits subject to check and 10 per cent of its time deposits, and section 1533 requires a majority of the board to be residents of Kansas.

"Section 1538 places trust companies under the *supervision* of the bank commissioner and requires them to be examined *in the same manner as banks*. They shall not commence business until they have *received authority* from the bank commissioner, which authority shall set forth that such company has been *incorporated by the state*, and has complied with the *provisions* of said act.

"The directors must make the same quarterly examinations as those of banks, and by section 1540 the banking act in a great many particulars is made applicable to trust companies.

"Section 2 of House Bill No. 674, published March 21, 1907, makes it unlawful for any corporation in (not of, or organized under, or admitted to do business in) the state of Kansas to engage in the business of a trust company as defined therein without complying with all of the provisions of the trust company act.

"From these quotations it is very clear to me that the legislature intended to have the bank commissioner

in the closest touch with and exercise the most rigorous supervision over such companies. If a foreign trust company can be admitted at all, what is there to prevent a great New York, or London, or Berlin, or Hong Kong trust company establishing a branch here? If it did, how could the annual examination be made, or how, in a feasible way, could the bank commissioner know that the various provisions of the acts in reference to 25 per cent of deposits, etc., etc., were being observed?

"I think that the admission of outside trust companies to do business in our state would be as clearly against our domestic policy as would be the admission of foreign state banks for the purpose of establishing branches to receive deposits and conduct a banking business." (Opinion of a former Attorney General of Kansas, copy of which was forwarded by the Bank Commissioner, Topeka, under date of Nov. 17, 1916, with the statement that the Attorney General then in office was in accord therewith.)

### Kentucky

Section 571 of Carroll's Statutes, 1915, provides that "all corporations except foreign insurance companies formed under the laws of this or any other state, and carrying on any business in this state, shall at all times have one or more known places of business in the state and an authorized agent or agents thereat upon whom process can be served." Such corporation must also file a statement with the Secretary of State, and shall display in a conspicuous place in its principal place of business in Kentucky its name followed by the word "incorporated."

"Replying to your letter of November 17th, will say in reply to Question 1 that you cannot organize a branch trust company in this state, but we are of the



opinion that your company can act as trustee for property located in this state.

"Replying to Question 3, will say that your company can unquestionably act as executor, administrator, guardian, etc., of an estate located in this commonwealth." (From letter of Banking Commissioner, Frankfort, Nov. 20, 1916.)

### Louisiana

The general foreign corporation laws (Act No. 267, 1914, section 23) relate to the admission of foreign corporations exercising the same rights as similar domestic corporations organized under that act. The act excludes domestic banking corporations. The trust powers of domestic companies appear to be confined to "Savings, safe deposit and trust banks" organized under Act 45, Laws 1902. See also Act 193, Laws of 1910.

### Maine

#### Specifically Exempted from General Foreign Corporation Law.

"Every corporation established under the laws other than those of this state for any lawful purpose *other than* as a bank, savings bank, *trust company*. \* \* \* which has a usual place of business in this state or which is engaged in business in this state permanently or temporarily without a usual place of business there, shall before doing business in this state, in writing appoint a resident of the state," etc. (Chap. 152, Public Laws of 1911, Sec. 1.)

#### Shall Not Act as Administrator or Guardian.

"No trust or banking company, association or institution, incorporated under the laws of this state, or of

any other state and doing business in this state, shall act or do business as administrator or guardian, anything in their charter to the contrary notwithstanding." (Revised Statutes, Chap. 48, Sec. 85.)

### Maryland

"A foreign trust company may act as trustee of property located in this state, and also as executor, administrator or guardian. There are no prerequisites which our statute requires, except, of course, that the foreign trust company must qualify in the usual way by giving bond if it is to act as trustee, and by giving bond and making affidavit before the Orphans' Court that it will properly perform its duties if it is to act as executor, administrator or guardian." (From letter of Attorney General of Maryland, Dec. 12, 1916.)

### Massachusetts

"No person or association and no bank or corporation, except trust companies incorporated as such in this commonwealth, shall use in the name or title under which his or its business is transacted the words 'Trust Company,' even though said words may be separated in such name or title by one or more other words, or advertise or put forth a sign as a trust company or in any way solicit or receive deposits as such. Whoever violates any provision of this section shall forfeit for each offense one hundred dollars for each day during which such offense continues. But the provisions of this section shall not prohibit an insurance company authorized prior to the first day of October in the year eighteen hundred and ninety-nine to do business in this commonwealth nor a company authorized prior to said date to

transact a foreign mortgage business in this commonwealth from using the words 'Trust Company' as a part of its corporate name." (Chap. 116, Revised Laws, Sec. 3.)

### Michigan

"It has been the settled public policy in Michigan that foreign trust companies cannot enter the state and transact business to any extent. There is no statutory provision by which foreign trust companies can be given the power or right to transact any of the functions of a trust company." (Letter of Commissioner of Banking Department, Dec. 1, 1916.)

### Minnesota

The general foreign corporation law requiring appointment of an agent for service of process in the state, filing copy of charter, etc., applies in terms to "every foreign corporation for pecuniary profit" doing business, acquiring, holding or disposing of property in Minnesota. (General Statutes, 1913, section 6206.)

### Mississippi

"No foreign trust company can serve as trustee, executor, administrator, guardian or conservator of an estate located in this state, as the statute has failed to provide for such companies in this respect." (From letter of Secretary of Banking Department, Nov. 23, 1916.)

### Missouri

Sec. 2859, R. S. 1909. "*Foreign corporation or person not to act as trustee, unless domestic corporation or resident trustee be named as co-trustee.*—No foreign

corporation or individual shall act as trustee in any deed of trust or other conveyance hereafter made by any person, firm or corporation, whereby any property, real or personal, situate or being in this state, is hereafter conveyed in trust for any purpose whatever, unless in such conveyance there shall be named as co-trustee a corporation organized under the laws of this state, and having power to act as trustee and execute trusts, or an individual citizen of the state of Missouri. No suit shall be brought to foreclose any such deed of trust, unless a resident trustee shall be a party plaintiff." (Laws 1895, p. 231, Sec. 4372, R. S. 1899.)

Under date of December 27, 1916, the Bank Commissioner of Missouri, Jefferson City, advises that Missouri courts have repeatedly held, and Missouri statutes expressly provide that an executor, administrator, guardian or curator must be a resident of the state of Missouri; that if a resident is appointed in such capacity and becomes a non-resident, then by that act he forfeits the right to continue in the administration of the trust.

### Montana

Section 3992 of the Revised Codes of 1907 states that it shall be unlawful for any person to use the words "trust" or "trust company" in any corporate title unless such company is organized and incorporated under the laws of Montana relating to "trust deposit security and savings bank corporations" or "such business be conducted by a foreign corporation which has fully complied with the laws of Montana and is duly qualified and authorized to conduct business in the state of Montana."

The general foreign corporation laws, sections 4413

to 4419, apply in terms to "all foreign corporations or joint stock companies except foreign insurance companies and corporations otherwise provided for, organized under the laws of the state or of the United States, or of any foreign government," doing business in the state.

### Nebraska

"In reply to your favor under date of the 18th inst., will say that there is no provision of statute authorizing a foreign trust company to transact business in this state. A trust company organized under the laws of this state may act as an executor of a will or administrator of an estate, but this is only by reason of an express statutory provision to that effect. The general rule is that 'a corporation can not act as an administrator of an estate of a deceased person under the laws of this state.' *Continental Trust Co. versus Peterson*, 107 N. W. 786, 76 Neb. 411." (From letter of Secretary of State Banking Board, Nov. 23, 1916.)

### Nevada

The general foreign corporation laws (Revised Laws, 1912, sections 1186, 1347-1350, 5024) apply in terms to "every corporation organized under the laws of another state, territory, the District of Columbia, a dependency of the United States or foreign country, which shall hereafter enter this state for the purpose of doing business therein." The Deputy Attorney General of Nevada advises under date of Jan. 25th, 1917, that foreign trust companies may act as trustee of property located in that state, and as executor, administrator, guardian or conservator of an estate located there. "If such foreign trust company enters this state

for the purpose of doing business therein it must file a copy of its articles of incorporation with our Secretary of State and pay the usual fee therefor."

### New Hampshire

A letter was addressed to the Chairman of the Board of Bank Commissioners, Concord, asking the following questions:

- (1) May a foreign trust company act as trustee of property located in New Hampshire?
- (2) If so, what prerequisites must it observe before taking title?
- (3) Are there any prerequisites for a foreign trust company entering upon the duties of an executor, administrator, guardian or conservator of an estate located in New Hampshire?

In reply the following was received from Joseph S. Matthews, Assistant Attorney General, under date of Nov. 28, 1916:

"I would refer you to Chapter 109, Laws of 1915. Section 34 of that act refers particularly to the subject matter of your third inquiry and is in terms as follows:

"Section 34. No trust company, loan and trust company, bank or banking company, or similar corporation, shall hereafter be appointed administrator of an estate, executor under a will, or guardian or conservator of the person or property of another."

"This section of the act applies to local as well as foreign corporations and appears to make all such corporations ineligible for appointment by our probate courts to be administrators, executors or conservators. Corporations, however, organized under the provisions of chapter 109 may be appointed as trustees."



### **New Jersey**

Foreign trust companies may be admitted to transact business in New Jersey under Chapter 251, Laws of 1890, and Chapter 35, Laws of 1907. These require the filing of an application for authority with the department of banking and insurance, a duly authenticated copy of its charter, a report of its condition at the close of business on the thirty-first day of December last preceding, a deposit of securities, and the payment of certain fees. Pamphlet copy of the law may be secured upon request addressed to the Department of Banking and Insurance, Trenton.

### **New Mexico**

“Answering your first inquiry, I have to say that I do not find anything in the laws of New Mexico which prohibit a foreign trust company from acting as trustee of property located in New Mexico.

“As to your second inquiry, I have to say that a foreign corporation is not qualified to act as an executor, administrator, guardian or conservator of an estate located in New Mexico.” (From letter of Assistant Attorney General, Nov. 21, 1916.)

### **New York**

Powers of foreign trust companies in this state are limited by Section 223 of the Banking Law, quoted in full at pages 326 to 327 of this book.

### **North Carolina**

“No corporation organized under the laws of any other state than North Carolina shall be eligible or entitled to qualify in this state as executor, administra-

tor, guardian or trustee under the will of any person domiciled in this state at the time of his death." (Chap. 196, Public Laws of 1915.)

### North Dakota

In *Grunow v. Simonitsch* (1911) 21 N. D. 277, 130 N. W. 835, the Northwestern Trust Company, a Minnesota corporation authorized to transact business in North Dakota, is held incompetent to receive letters of administration from a North Dakota court. Revised Code, Sec. 4682, granting corporations the power to act as administrators, executors, etc., is, according to this decision, limited to domestic corporations.

### Ohio

"Foreign trust companies have the same power in the acceptance and execution of trusts as are now conferred on them by section 9775, General Code of Ohio.

"Trust companies must have capital of at least \$100,000.00, and before being eligible to transact business in Ohio must deposit in cash or securities with the Treasurer of State, \$50,000.00 if its capital is \$200,000.00 or less, and \$100,000.00 in cash or securities if its capital is more than \$200,000.00.

"Trust companies, either foreign or domestic, are not permitted under the Ohio laws to act as executor or administrator but may be appointed as trustees under any will or instrument creating a trust for the care and management of property.

"Each foreign trust company desiring and intending to do business in this state shall pay to the Superintendent of Banks a fee of \$50.00 before a certificate can be granted." (From letter of Assistant Superintendent of Banks, Columbus, Nov. 20, 1916.)

## Oklahoma

"The State Banking Department has referred your favor of the 6th inst. to me for reply. In your letter you make the following inquiries:

"1. Can a foreign trust company act as trustee of property located in your state?"

"2. If so, what prerequisites must it observe before taking title?"

"3. Are there any prerequisites for a foreign trust company entering upon the duties of an executor, administrator, guardian or conservator of an estate located in your state?"

"In reply to these inquiries, you are advised that a careful consideration of the law of this state leads this office to the conclusion that there is no existing statute under which a foreign trust company can act in this state. Our trust laws seem to indicate that the trust company must be a domestic corporation before acting in that capacity." (From a letter of Assistant Attorney General, Oklahoma City, Dec. 14, 1916.)

## Oregon

Requirements of a foreign trust company doing business in this state are contained in Chapter 354, Laws of 1913. This law does not prevent foreclosure by a foreign trust company which had accepted trusteeship under a corporate mortgage before its enactment. (*Fidelity Trust Co. v. Washington-Oregon Corp.* [1914], 217 Fed 588.) The following is an opinion by the Attorney General:

"November 29, 1915.

"Mr. S. G. Sargent, Superintendent of Banks, State House.

"Dear Sir: In compliance with your oral request of recent date, I have examined the question submitted

by you as to what fees should be paid by a foreign trust company which wishes to become trustee for the issuance of bonds in this state, by accepting a mortgage, or deed of trust, to be recorded in one or more counties of this state as provided in Section 24, Chapter 354, page 730, Laws of 1913.

"Said section exempts foreign trust companies from the provisions of said Chapter 354 under such conditions as follows:

" 'Provided, that a corporation qualified to act as a trust company in the state of its domicile may act as trustee for and issue all bonds, debentures or notes issued under the terms of a mortgage or deed of trust, duly recorded in some county in this state; and provided, further, that such foreign trust company shall have appointed and shall maintain an agent or attorney in this state upon whom or upon which legal notice or process may be served.'

"These provisos follow the provision in the statute that foreign trust companies cannot hold personal or real property in trust in this state, or act as trustee without having complied with all of the provisions of said chapter providing for the organization, regulation and control of trust companies.

"In the case under consideration, it appears that the trust company in question is authorized to act in that capacity and receive and hold property in trust in the state of Pennsylvania, and that by taking the mortgage or deed of trust and recording the same in one or more counties in this state, it would be authorized to enter into such relation without complying with the other provision of said chapter, but this does not dispose of the question of fees to be paid for the filing of its copy of articles of incorporation, certificate of authority from the Secretary of State of Pennsylvania, and other papers necessary to be filed in your office in order for it to transact business in this state as a corporation, which business it necessarily does by becom-

ing trustee and holding property in this state. We therefore look to the general corporation laws to ascertain the answer to this question.

"Section 6727, Lord's Oregon Laws, provides the papers which shall be filed by a foreign corporation desiring to transact business in the state of Oregon, with the Corporation Commissioner, and the fee to be paid, fixing the same at \$50.00, together with the annual license fee due for the succeeding fraction of the fiscal year. Chapter 381, Laws of 1913, fixes the annual license fee for foreign corporations at \$100.00.

"I am mindful of the provisions of Section 4564 (a), Lord's Oregon Laws, as amended by Section 2, Chapter 285, at page 428, Laws of 1915, which provides among other things:

"All fees heretofore payable to the Secretary of State or the Corporation Commissioner for the State of Oregon by any bank, banker, or trust company, shall hereafter be paid to the Superintendent of Banks."

"But the above provision does not seem to apply to the case at bar.

"I would, therefore, answer your inquiry to the effect that the fee to be charged such foreign trust company for the filing of the papers required to be filed with the Corporation Department is the sum of \$50.00, together with the proportionate part of \$100.00 for the fraction of the year until July 1, 1916, and the papers to be filed are those provided for in Section 6727, L. O. L.

"All papers herewith returned.

"Very respectfully yours,

"Geo. M. Brown, Attorney General."

### Pennsylvania

The general foreign corporation laws apply to every foreign corporation doing business in the state. (Laws of 1911, p. 710, section 1.)

"No person, copartnership, limited copartnership,

or corporation, except only corporations reporting to, and under supervision of the Commissioner of Banking of this commonwealth, or reporting to and under supervision of the Commissioner of Banking of some other state or commonwealth, shall, in this commonwealth, advertise or put forth any sign as a trust company, or use the word 'trust' as part of its name or title: Provided always, that this act shall not be held to prevent any individual, as such, from acting in any trust capacity as heretofore. Any violation of any provision of this section shall constitute a misdemeanor, and on conviction thereof, the offender shall be sentenced to pay a fine of not exceeding five hundred dollars for each offense." (Sec. 2 of An Act, approved, April 22, 1909.)

An Act approved June 7, 1907, providing in terms for the licensing of foreign investment companies including foreign trust companies, appears to be limited to companies selling securities in the state on the partial payment plan.

"A non-resident may be appointed trustee upon giving security." Schott's Estate, 11 Plia. 120, 21 L. I. 92, Strobel's Estate, 2 W. N. C. 409.

"The courts of Pennsylvania have no power, even with the consent of the *cestui que trust* and remainderman, to authorize a trustee to transfer the trust fund to a banking institution in a foreign country to hold as trustee." Vale's Penn. Digest, citing Arfwedson's Estate, 11 Dist. 73, 26 Pa. C. C. 212.

"A non-resident who has been appointed executor under the will of a citizen of Pennsylvania, resident within the jurisdiction, and has given security within the jurisdiction for the performance of his duties as executor, and taken the oath of office and assumed its



duties, is not to be regarded as a foreign executor." *McCahan v. Reeder*, 10 Dist. 298, 25 Pa. C. C. 148.

"A non-resident has no right to letters of administration, and he is incompetent to object to the granting of letters to another or to petition to have them revoked if granted." *Fick's Appeal*, 114 Pa. 29.

### Rhode Island

Section 23, Chapter 227 of the General Laws, 1909, contains the following provision:

"No corporation, either domestic or foreign, and no person, partnership, or association, except banks, savings banks, or trust companies incorporated under the laws of this state, shall hereafter make use of any sign, at the place where its business is transacted, having thereon any name, or other word or words, indicating that such place or office is the place or office of a bank, savings bank, or trust company. Nor shall any such corporation, person, association, or partnership make use of or circulate any written or printed or partly written and partly printed paper whatever, having thereon any name, or other word or words, indicating that such business is the business of a bank, savings bank, or trust company; nor shall any such corporation, person, association, or partnership receive deposits and transact business in the way or manner of a bank, savings bank, or trust company, or in such a way or manner as to lead the public to believe, or as, in the opinion of the bank commissioner, might lead the public to believe, that its business is that of a bank, savings bank, or trust company."

Under date of December 12, 1916, the Secretary of State at Providence advises that in his opinion a foreign trust company cannot act as an executor, administrator, guardian or conservator of an estate located in Rhode Island.

### South Carolina

A letter was addressed to the State Bank Examiner, Pickens, asking the following questions:

- (1) May a foreign trust company act as trustee of property located in South Carolina?
- (2) If so, what prerequisites must it observe before taking title?
- (3) Are there any prerequisites for a foreign trust company entering upon the duties of an executor, administrator, guardian or conservator of an estate located in South Carolina?

In reply the following was received from Thos. H. Peoples, Attorney General, under date of Nov. 23, 1916:

"Your letter of the 19th inst. addressed to the Hon. I. M. Mauldin, State Bank Examiner, has been referred to me for attention."

"I beg to say in reply that foreign corporations desiring to do business in this state must comply with the provisions of our state statutes requiring them to pay license fees, file copies of their charters and by-laws in the office of the Secretary of State and appoint an agent and place within the state for service of process upon them. There are no special statutes relating to foreign trust companies.

"Such a company could not be appointed administrator or guardian by a court of this state inasmuch as administrators or guardians are officers of the court who must be subject to the orders of the court in this state and always on hand to answer its process.

"By special statutory provision, contained in Section 3591, Volume I, Code of Laws of South Carolina, 1912, a non-resident may receive letters testamentary from the Probate Court of this state upon giving the bond required by that section."

### South Dakota

The following opinion was rendered by the Attor-

ney for the Department of Banking and Finance, Mitchell, S. D., under date of December 18, 1916:

"First. It is my opinion that under the laws of our state a foreign trust company cannot act as trustee of any property located in our state.

"Second. I do not think a foreign trust company can act as executor, administrator, guardian or conservator of an estate located in South Dakota.

"The law of this state relating to trust companies, being Chapter 255 of the Session Laws of 1911, provides for the incorporation and qualification of companies to act as trustees and as administrators and executors. This law does not make any provision for foreign corporations to act in such capacity, and Section 34 of the same provides, among other things, that no corporation shall accept or execute any trust mentioned in that act, unless it shall have complied with the provisions of the act.

"It is, therefore, my opinion that a foreign trust company cannot exercise any of its corporal powers in the state of South Dakota, either by acting as trustee or by acting as executor or administrator. The only way that you can secure such right is to incorporate and comply with the provisions of Chapter 255 of the Session Laws of 1911 of the state of South Dakota."

### Tennessee

According to Section 2546 of Shannon's Code, 1896, "each and every corporation created or organized under or by virtue of any government other than that of this state for any purposes whatever, desiring to own property or carry on business in this state of any kind or character, shall first file in the office of the Secretary of State a copy of its charter."

Under date of November 20, 1916, the Superintendent of Banks, Nashville, advises that the Banking Laws of Tennessee, which that department administers, does

not deal with the qualification of a foreign trust company doing business in that state.

### Texas

Foreign corporations authorized to do business in the state are permitted to employ the word "trust" as part of their name, by using thereafter the words "without banking privileges." (Sec. 191, Art. 557, Laws of 1913.)

The general foreign corporation laws (Revised Civil Statutes, 911, Articles 1314-1318) apply in terms to all foreign corporations "desiring to transact business in this state, or solicit business in this state, or establish a general or special office in this state."

### Utah

There are no statutory prerequisites specifically relating to the authority or admission of foreign trust companies. The general foreign corporation laws (Compiled Laws, 1909, 351-352, as amended by Laws, 1915, Chap. 136) relate to all foreign corporations doing business in the state. No such corporation shall "take, acquire or hold title, possession or ownership of property, real, personal, or mixed, within this state," without compliance with the provisions of this law.

### Vermont

The Attorney General, Brattleboro, advised under date of Dec. 23, 1916, that in his opinion a foreign trust company may not act as a trustee of property located in Vermont or as an executor, administrator, guardian or conservator of an estate located in Vermont, because of the provisions of section 73 of Act No. 158 of the Acts of 1910. This section reads as follows:

"A trust company incorporated under the laws of

the state may be appointed and act as executor of a will, codicil or writing testamentary, as administrator with the will affixed, as administrator of a person deceased, as receiver, assignee, trustee or guardian of a person subject to guardianship, under the same circumstances, in the same manner and subject to the same control by the court having jurisdiction, as a natural person legally qualified."

From this it would appear that the Attorney General's opinion is based upon the reasoning that the *express* authority in the cases mentioned to domestic trust companies, impliedly excludes foreign trust companies. It will be noted that the statute does not include acting as trustees under agreement, mortgage and other corporate trusts.

### Virginia

"The statutes of this state do not authorize a foreign trust company to act as trustee of property located in this state, nor to enter upon the duties of an executor, administrator, guardian, or conservator of an estate located in this state." (From letter of Chairman of State Corporation Commission, Dec. 11, 1916.)

### Washington

Foreign trust companies not doing banking may be admitted under Rem. and Bal. Code, Sec. 3720 *et seq.*, if they comply with the domestic trust company act (Rem. and Bal. Code, Sec. 3346 *et seq.*), Atty. Gen. Opinions, 1911-2, p. 346.

"In case any foreign corporation whose name contains the word 'trust,' or whose articles of incorporation empower it to do a trust business, desires to engage in business of loaning money on mortgage security in this state, it shall file, in addition to its articles of incor-

poration or association, a resolution of its governing board, duly attested by its president and secretary, expressly stating that it will not receive deposits in the state of Washington or accept from citizens and residents of the state of Washington property and money or either, in trust for investment." (Rem. and Bal. Code, Sec. 3346.)

### West Virginia

The "Title and Trust Company Law," as amended and re-enacted by Chap. 7, Acts of 1903, states in section 6 thereof that "no company shall be entitled to any of the provisions of this act," which include usual trust company activities, unless it has filed with the secretary of state a duly authenticated certificate showing its paid-up and unimpaired capital to be at least \$100,000. All such companies are subject to examination by the commissioner of banking. The general foreign corporation laws (Code 1913, section 2929, and chapter 3, Laws of 1915) apply in terms to all foreign corporations holding property or doing business in the state.

### Wisconsin

"In reply to your communication of November 18th will state that a foreign trust company may act as trustee for property located in this state, but it cannot foreclose on mortgage property unless it complies with section 1770b of the Wisconsin Statutes.

"The prerequisites to be observed before taking title are found in section 1770b.

"A foreign trust company cannot enter upon the duties of executor, administrator, guardian, or conservator of an estate located in Wisconsin.



"In order to do a trust business in this state it is necessary for the company desiring to do such business to organize as a trust company under section 2014-11i to section 2014-77q of the Wisconsin Statutes." (From letter of Commissioner of Banking, Madison, Nov. 28, 1916.)

### Wyoming

There is no specific provision in the trust company act, chapter 105, Laws 1913, pertaining to foreign trust companies. The general foreign corporation law (Compiled Statutes, 1910, sections 3973, 4252) applies in terms to "every incorporated company, incorporated under the laws of any foreign state or kingdom, or of any state or territory of the United States beyond the limits of this state, excepting insurance companies."

# Table of Cases

(References are to pages)

Page

## A

Alabama & N. O. Trans. Co. v. Doyle (210 Fed. 173).....	132
Alexander v. Graecen (36 N. Y. 526).....	526
Alpena Portland Cement Co. v. Jankins & Reynolds Co. (244 Ill. 354) .....	222
Alston v. State (92 Ala. 124).....	161
Althouse v. Guaranty Trust Co. (137 N. Y. Supp. 945).....	140, 154
Am. L. & T. Co. v. East & West. R. Co. (37 Fed. 242).....	220, 223
Amiss v. Williamson (17 W. Va. 673).....	39
Application of Cooper, Matter of (22 N. Y. 67).....	213
Assarie State Bank v. Dolley (219 U. S. 121).....	23
Arfwedson's Estate (11 Dest. 73).....	549
Avery, Matter of (45 N. Y. Misc. 529).....	219

## B

Bahia & S. F. R. Co., In re (32 Q. B. 584).....	134
Baker v. Crandall (78 Mo. 584).....	211
Baldy v. Hunter (171 U. S. 388).....	69
Baltimore v. Baltimore Trust & G. Co. (166 U. S. 673).....	100
Bangor v. Beal (85 Me. 129).....	61
Bangor Electric Light & P. Co. v. Robinson (52 Fed. 520).....	174
Bank Comm'rs v. Security Trust Co. (70 N. H. 536).....	255
Bank Comm'rs v. Security Trust Co. (75 N. H. 107).....	74, 260
Bank of Commerce v. Payne (86 Ky. 446).....	446
Bank of Kentucky v. Schuylkill Bank (1 Prs. Eq. Cas. 180).... .....	130, 145, 151
Bank of Montreal v. White (154 U. S. 660).....	167
Bank of Saginaw v. Title & Trust Co. (105 Fed. 491).....	52
Barber v. West Jersey T. & G. Co. (53 N. J. Eq. 158).....	197
Beard v. Independent Dist. (88 Fed. 375).....	251
Bean v. Am. L. & T. Co. (122 N. Y. 622).....	179
Benwell v. Mayor, etc. (55 N. J. Eq. 260).....	135
Bergdorf, Matter of (206 N. Y. 309).....	33
Black v. Wiedersheim (143 Fed. 359).....	461

(References are to pages)	Page
Board, etc., v. Am. L. & T. Co. (67 Minn. 112).....	159
Board v. Security Bank (75 Minn. 174).....	160
Bobb v. Bobb (89 Mo. 411).....	61
Bothin v. Cal. Title Ins. & Trust Co. (153 Cal. 718).....	190
Bottom v. Clarke (7 Cush. 487).....	172
Bowman v. Wooton (8 B. Mon. Ky. 67).....	39
Bracey v. Darst (218 Fed. 482).....	132
Bradwell, In re (55 Ill. 535).....	203
Branch (100 U. S. 673).....	160
Brier, Re (28 C. D. 238).....	95
Broadway Realty Co. v. Lawyers' T. Ins. & T. Co. (91 N. Y. Misc. 137) .....	190, 194
Bronson, Matter of (150 N. Y. 1).....	505
Brooks v. Walker (3 La. Ann. 150).....	30
Brown, Matter of (86 N. Y. Misc. 187).....	175
Brown v. Wyandotte Co. (58 Kan. 672).....	160
Browning v. Browning (3 N. M. 371).....	211
Brumridge v. Brumridge (27 Beav. 5).....	93
Buckler, Matter of (96 N. Y. App. Div. 397).....	55
Buckley v. McGuire (58 Ala. 226).....	31
Budge v. Gummow (L. R. Ch. 719).....	92
Bushong v. Taylor (82 Mo. 660).....	101
Butler v. Rohm (46 Md. 541).....	98
Butterfield v. Cowing (112 N. Y. 486).....	110
Byers v. Union Trust Co. (175 Pa. St. 318).....	109

## C

Caldwell v. Sioux Falls Stock Yards Co. (U. S.).....	132
Callender v. Kelly (190 Pa. St. 455).....	236
Camden Safe Deposit & Trust Co. v. Lord (67 N. J. Eq. 489).....	42, 239
Cameron v. Hicks (141 N. C. 21).....	77
Cameron v. Hicks (65 W. Va. 484).....	161
Carlisle v. Norris (157 N. Y. App. Div. 313).....	175
Carnegie Trust Co. v. Kress (215 N. Y. 706).....	235, 248
Carrington v. Turner (101 Md. 437).....	235, 238
Carter v. Whitcomb (74 N. H. 482).....	86
Central Gold Min. Co. v. Platt (3 Daly (N. Y.) 263).....	103
Central Nat. Bank v. Comm. Life Ins. Co. (104 U. S. 54).....	76
Central Trust Co. v. Central Trust Co. (149 Fed. 789).....	15
Central Trust Co. v. C., H. & D. Ry. Co. (169 Fed. 466).....	117
Central Trust Co. of Ill. v. Hearne (88 S. E. 450).....	217
Cicero (63 Neb. 777).....	161
Chambers v. Land Credit Trust Co. (92 Kan. 30).....	234
Chapman, In Re (1896, 2 Ch. 763).....	68
Cheney v. Sharman (145 N. Y. App. Div. 456).....	81

	Page
(References are to pages)	
Chestnut St. Trust & Savings Fund Co. v. Hart (217 Pa. 506)...	240
Chicago, B. & Q. R. Co. v. Ill. (200 U. S. 561).....	19
Chicago Title & Trust Co. v. Bashford (120 Wis. 281).....	222, 223, 228
Chicago Title & Trust Co. v. Doyle (259 Ill. 489).....	32
Chicago Title & Trust Co. v. Zinzer (264 Ill. 31).....	32
Chilcott v. Hart (23 Colo. 40).....	211
Chin Mee Ho, In re (140 Cal. 263).....	30
Clark, In re (3 Dowling & R. 260).....	207
Clark, Re (195 Pa. St. 520).....	20, 28, 30
Clark v. Campbell (23 Utah 569).....	180
Clarkson Home v. C. & O. R. Co. (92 N. Y. App. Div. 491).....	135
Clawson v. Primrose (4 Del. Ch. 643).....	211
Clay v. Clay (60 Ky. 548).....	61
Cobb v. Taylor (64 N. C. 193).....	69
Colonial Trust Co., Appeal of (241 Pa. 554).....	111
Colorado & Southern Ry. Co. v. Blair (214 N. Y. 497).....	100, 466
Colquitt v. Simpson (72 Ga. 501).....	158, 160
Columbia Knickerbocker Trust Co. v. Ithaca St. R. Co. (141 N. Y. Supp. 249) .....	110
Colvin v. Holbrook (2 N. Y. 129).....	144
Commercial Tel. Co. v. Territorial Bank & T. Co. (38 Tex. Civ. App. 192) .....	223
Commonwealth v. Alba Dentist Co. (13 Pa. Dist. Rep. 432)....	204
Commonwealth v. Am. Trust Co. (241 Pa. 153).....	260
Commonwealth v. Bailey (129 Pa. St. 480).....	160
Commonwealth v. City Safe D. & S. Co. (218 Pa. St. 50).....	254
Commonwealth v. Union Surety & Guaranty Co. (37 Pa. Super. Ct. 179) .....	80
Commonwealth v. Vrooman (164 Pa. St. 306).....	21
Condert v. U. S. (175 U. S. 178).....	160
Connolly v. Connolly (17 Ir. Ch. Rep. 208).....	..
Continental Trust Co. v. Peterson (76 Neb. 411).....	44, 47, 542
Continental Trust Co. v. Tallahassee Falls Mfg. Co. (222 Fed. 694) .....	220
Continental & Commercial Trust & Savings, etc., Co. v. Allis-Chalmers Co. (200 Fed. 600).....	115
Contracting & Bldg. Co. v. Continental Trust Co. (108 Fed. 1)..	123
Compton Co., Wm. R., v. Allen (216 Fed. 537).....	132
Co-operative Law Co., Matter of (198 N. Y. 479).....	203
Copelan v. Sohn (82 S. E. 1016).....	468
Cottam v. Eastern Counties R. Co. (1 John & H. 243).....	83
County of Mecklenburg v. Beales (111 Va. 691).....	160
Coyle v. Taunton Safe Deposit Co. (207 Mass. 441).....	81
Craft v. Ind. D. & W. Ry. Co. (166 Ill. 580).....	473

(References are to pages)	Page
Crall v. Comm. (103 Va. 855).....	204
Crane v. Hearn (26 N. J. Eq. 378).....	94
Craughwell v. Monsan River Trust Co. (95 Atl. 222).....	249
Crawford v. Wearne (20 S. E. 72).....	514
Creditors' Claim & Adj. Co. v. Northwest Loan & Trust Co. (81 Wash. 247) .....	44
Cross v. U. S. Trust Co. (131 N. Y. 330).....	227
Cussen v. So. Cal. Savings Bank (133 Cal. 534).....	170
Cutting v. Morlor (78 N. Y. 454).....	167
Cuyler v. Wayne (64 Ga. 78).....	30

## D

Dashiell v. Atty. Gen. (5 Harr. & J. 392).....	211
Davidge v. Guardian Trust Co. (203 N. Y. 331).....	44, 109, 259
Davis v. Harmon (62 Va. 194).....	61
Davies, In re (68 Kan. 791).....	243
Dayton v. Johnson (69 N. Y. 419).....	30
Dean v. Northern Trust Co. (259 Ill. 148).....	44
DeHaven v. Pratt (223 Pa. 663).....	81
Denny v. Manhattan Co. (2 Dennio 118).....	144
Denton v. Title Co. (112 Tenn. 320).....	188
Drozin v. Buriton (15 Bur. 221).....	93
Dickel v. Nashville Abstract Co. (89 Tenn. 431).....	182
Dickerman v. Northern Trust Co. (176 U. S. 181).....	112
Dillaway v. Boston Gaslight Co. (174 Miss. 80).....	119, 471
Dillaye v. Comm. Bank (51 N. Y. 345).....	375
Dix v. Burford (19 Beav. 409).....	93
Dollar Savings Fund & Trust Co. v. Pittsburgh Plate Glass Co. (213 Pa. St. 307).....	137, 138, 152
Dominion Trust Co. v. Hildner (90 Atl. 69).....	241
Dow v. Memphis & L. R. R. (20 Fed. 260).....	106
Dreifus v. Union Savings Bank & Trust Co. (38 Oh. Cir. Ct. R. 46) .....	109
Duncan, In re (83 S. C. 183).....	209
Duncan v. Jandon (15 Wallace 165).....	514
Dunham v. City Trust Co. (115 N. Y. App. Div. 584).....	143
Dunne v. O'Reilly (11 U. C. C. P. 404).....	207
Dunn v. State (13 Ga. App. 361).....	51

## E

Economy Bldg. & Loan Ass'n v. West Jersey Title & Guaranty Co. (64 N. J. S. 27).....	??
Eley v. Miller (7 Ind. App. 529).....	210
Elliott v. Turner (13 Sim. 477).....	93
Elmer v. Title G. & T. Co. (156 N. Y. 10).....	184, 185
Empire City Bank, 10 Howard's Prac. (Matter of), (N. Y. 498)..	56

	Page
Empire State Surety Co. v. Carroll County (194 Fed. 593).....	256
Equitable Bldg. & Loan Ass'n v. Bank of Commerce & Trust Co. (102 S. W. 901).....	188
Equitable Trust Co. v. Garis et al. (190 Pa. 544).....	12
Erie School Dist. v. Griffith (203 Pa. 123).....	61
Estate Solicitors' Loan & Trust Co. (3 Pa. Supr. Ct. 244).....	80
Ex parte Belchier (Amb. 218).....	94
Ex parte Calhoun (87 Ga. 359).....	200
Ex parte Taylor (66 So. 292).....	132
Ex parte Wall (107 U. S. 265).....	213

## F

Fairchild v. Hedges (14 Wash. 117).....	160, 162
Farmers' Loan & Trust Co. v. Bd. (93 Fed. 579).....	179
Farmers' Loan & Trust Co. v. C. & M. P. R. Co. (68 Fed. 412)...	226
Farmers' Loan & Trust Co. v. Chicago, etc., R. W. Co. (27 Fed. 146) .....	535
Farmers' Loan & Trust Co. v. Farmers' Loan & Trust Co. of Kansas (21 Abb. N. C. 104).....	16
Farmers' Loan & Trust Co. v. Ferris (67 N. Y. App. Div. 1).....	227
Farmers' Loan & Trust Co. v. Harmony Fed. M. Ins. Co. (51 Barb. 33) .....	217
Farmers' Loan & Trust Co. v. Hughes (11 Hun. 130).....	472
Farmers' Loan & Trust Co. v. Lake St. El. R. Co. (173 Ill. 439) 224, 227	
Farmers' Loan & Trust Co. v. Meridian Waterworks Co. (139 Fed. 661) .....	100
Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (66 Fed. 169) 113 (Same case in 70 Fed. 423).....	115
Farmers' Loan & Trust Co. v. Smith (74 Conn. 625).....	218
Fed. Union Surety Co. v. McGuire (Ark. 163 S. W. 1171).....	27
Fentress Co. v. Reed (116 Tenn. 110).....	161
Fenwick v. Greenwell (10 Beav. 412).....	93
Fick's Appeal (114 Pa. 29).....	549
Fidelity Trust Co. v. Clark (65 N. J. L. 495).....	??
Fidelity, etc., Trust & S. D. Co. v. Railroad Co. (32 W. Va. 244) ..	100
Fidelity Trust Co. v. Washington-Oregon Corp. (217 Fed. 588) .....	110, 119, 288, 546
Fifth Ave. Bank v. Forty-second St., etc., R. R. Co. (137 N. Y. 231) .....	129, 136
First National Bank v. Bunting (7 Id. 27).....	251
First National Bank v. Graham (100 U. S. 699).....	163
First National Bank v. Guardian Trust Co. (187 Mo. 494).....	44, 58
First National Bank v. Union Trust Co. (155 S. W. 989).....	218
First National Bank v. Zent (39 Oh. St. 105).....	165
First Nat. Ins. Co. v. Salsbury (130 Mass. 303).....	106
Fitchie v. Brown (211 U. S. 321).....	44



(References are to pages)	Page
Florida Savings Bank v. Rivers (36 Fla. 575).....	246
Foehrenbach v. German-Am. Title & Trust Co. (217 Penn. 331) .....	183, 189
Fogg v. Bank of Friar's Point (80 Miss. 750).....	251
Fosdick v. Schall (99 U. S. 235).....	123
Foster v. Mansfield (3 Met. (Mass) 412).....	178
Frenkel v. Hudson (82 Ala. 158).....	241
Frismuth v. Farmers' Loan & Trust Co. (95 Fed. 5).....	105

## G

Gallagher v. Holland (20 Nev. 164).....	30
Garesche v. Lovering Co. (48 S. W. 653).....	513
Gause v. Baldt (188 N. Y. 546).....	81
Gause v. Commonwealth Trust Co. (196 N. Y. 134).....	43, 58, 258
Geiger-Jones Co. v. Turner (230 Fed. 233).....	132
German Alliance Ins. Co. v. Lewis (233 U. S. 389).....	22, 27
Germania S.V. & Trust Co. v. Driskill (23 Ky.L. Rep. 2050) 41, 231,	237
Gernsheim v. Central Trust Co. (16 N. Y. Supp. 127).....	53
Geyser-Marion Gold Min. Co. v. Stark (106 Fed. 558).....	129, 513
Gibson v. American Loan & Trust Co (58 Hun. 443).....	119, 472
Glaser v. Priest (29 Mo. App. 1).....	13
Glyn v. Title G. & T. Co. (132 N. Y. App. Div. 859).....	184-5-6
Goff v. Goff (54 W. Va. 304).....	74
Gray v. Merriam (148 Ill. 179).....	164
Gregg v. Hudson (8 Phila. (Pa.) 91).....	172
Gregory v. Binghamton Trust Co. (154 N. Y. Supp. 370).....	235
Griffin v. Miss. Levee Commrs. (71 Miss. 767).....	160
Groff v. City Savings Fund & Trust Co. (46 Pa. Supr. Ct. 423)..	79
Grunow v. Simonetsch (21 N. D. 277).....	544
Guaranty Trust Co. v. Diltz (42 Tex. Civ. App. 26).....	170
Grocers' and Merchants' Bureau v. Gray (Kentucky).....	208
Gulick v. Bruere (42 N. J. Eq. 639).....	77

## H

Hackett v. Patterson (16 N. Y. Supp. 170).....	174
Hadley v. Freedman's Saving & Trust Co. (2 Tenn. Ch. 122)....	218
Haeg v. Haeg (53 Minn. 33).....	178
Hale v. Adams (21 U. R. 400).....	92
Holland Trust Co. v. Sutherland (177 N. Y. 327).....	100, 111
Hall v. Geiger-Jones Co. (U. S.).....	132
Halloway v. Halloway (60 L. T. R. 46) .....	513
Halloway v. Porter (46 Ind. 62).....	211
Hamilton v. Newland (1 Nev. 40).....	211
Hannon v. Siegel-Cooper Co. (167 N. Y. 244).....	204
Hannum v. McRae (18 Ontario P. R. 185).....	244

(References are to pages)	Page
Hansen v. Am. Security & Trust Co. (159 N. Y. App. Div. 801) ..	228
Hardage v. Stroop (58 Ark. 303) .....	211
Harris v. Chipman (9 Utah 101) .....	30
Harrison v. Union Trust Co. (144 N. Y. 326) .....	119
Hatt v. Hagaman (12 Misc. 171) .....	513
Hawley v. Lathene (75 N. C. 505) .....	163
Healy v. Lassen County Supr. Ct. (127 Cal. 659) .....	31
Henkel v. Carnegie Trust Co. (213 N. Y. 185) .....	159
Hervey v. Ill. Midland Ry. Co. (28 Fed. 169) .....	226
Herzog v. Title Guarantee & Trust Co. (148 N. Y. App. Div. 234)	64
Hill v. Hill (79 N. J. Eq. 521) .....	61
Hodges' Estate, In re (66 Vt. 70) .....	61
Hoke v. U. S. (227 U. S. 308) .....	20
Holland Trust Co. v. Thomson-Houston El. Co. (170 N. Y. 68) ..	462
Hollister v. Stewart (111 N. Y. 644) .....	462
Holmes v. Gilman (138 N. Y. 369) .....	76
Holt Co. v. Cronin (79 Neb. 424) .....	160
Hopkins v. Burr (24 Colo. 502) .....	76
Horbach v. Tyrell (48 Neb. 514) .....	246
Horn v. Lockhart (17 Wall 570) .....	69
Howerton v. Sexton (104 N. C. 75) .....	30
Hoyt v. M. Lagan (87 Ia. 746) .....	178
Hughes v. Thistlewood (40 Kan. 232) .....	178
Hunsberger v. Guaranty Trust Co. (150 N. Y. Supp. 190) .....	109, 462
Hunt v. Insley (56 Kan. 213) .....	30

### I

Independent Dist. v. King (80 Ia. 500) .....	251
Indiana Trust Co. v. Griffith (176 Ind. 643) .....	60, 68
Industrial & General Trust Ltd. v. Tod (180 N. Y. 215) .....	462
Innerarity v. Merchants' Nat. Bank (139 Mass. 332) .....	241
International Trust Co. v. International Loan & Trust Co. (153 Mass. 271) .....	14
Ions v. Harbison (112 Cal. 260) .....	30

### J

Jackson and Wood, In Re (1 Barn 269) .....	207
Jackson v. Phillips (14 Allen 556) .....	86
Jacobson v. Mass. (197 U. S. 11) .....	19
Jacobus v. Jamestown Mantle Co. (211 N. Y. 154) .....	238
James, Matter of (144 N. Y. 6) .....	505
Jenkins v. Nat. Village Bank (58 Me. 275) .....	166
Jenkins v. Neff (163 N. Y. 320) .....	11
Jenkins v. Neff (186 U. S. 230) .....	47
Johnson v. Johnson (88 Ky. 275) .....	23

	Page
	(References are to pages)
Jones v. Countess of Manchester (1 Vtr. 197).....	242
Jones v. Habersham (107 U. S. 174).....	86
Jones v. Morgan (90 N. Y. 479).....	167
Justice v. Empire State Surety Co. (209 Fed. 105).....	27

## K

Kahn v. Smelting Co. (102 U. S. 641).....	121
Kansas City Gas Co. v. Kansas City (198 Fed. 500).....	20
Kasey v. Fidelity Trust Co. (131 Ky. 609).....	89
Kaulbach v. Knickerbocker Trust Co. (148 N. Y. App. Div. 331)	108
Kavanaugh v. Commonwealth Trust Co. (64 N. Y. Misc. 303)...	46
Kavanaugh v. Gould (147 N. Y. App. Div. 231).....	232
Keuthan v. St. Louis Trust Co. (101 Mo. App. 1).....	187
Kerrison v. Stewart (93 U. S. 155).....	101
Killingsworth v. Portland Trust Co. (18 Ore. 351).....	46, 52
King v. Merchants' Exch. (E. 5 N. Y. 546).....	98
Knickerbocker Trust Co. v. Condon (147 N. Y. App. Div. 871)..	108
Koch v. Missouri-Lincoln Trust Co. (181 S. W. 44).....	249
Kreitz v. Behrensmeyer (149 Ill. 496).....	211

## L

Lackland v. Renshaw (256 Mo. 133).....	27
Lafayette Trust Co. v. Biggs (213 N. Y. 280).....	250
Lamar v. Micou (112 U. S. 452).....	69
L. & N. Ry. Co. v. Mottley (219 U. S. 467).....	19
Land Title & Trust Co. v. Asphalt Co. (127 Fed. 1).....	115
Land Title & Trust Co. v. Tatnall (132 Fed. 305).....	115
Landon v. Brown (160 Pa. St. 538).....	178
Leak's Heirs v. Leak's Ex'r (25 Ky. Law Rep. 1703).....	90
Leatherwood v. Sullivan (81 Ala. 458).....	30
Le Baudy v. Carnegie Trust Co. (154 N. Y. Supp. 900).....	253
Lee v. Sankey (L. R. 15 Eq. 204).....	85
Lehigh Coal & Nav. Co. v. Field (8 Watts & S. 232).....	120
Leyton v. Sneyd (2 Moore C. P. 583).....	85
License Victuallers' Mut. Trading Ass'n (42 Ch. D. 1).....	58
Lincoln v. Morrison (64 Neb. 822).....	76
Line v. Lawder (122 Ind. 548).....	61
Lippitt v. Thames Loan & Trust Co. (88 Conn. 185).....	253
Little v. Chadwick (151 Mass. 109).....	256
Livingston v. Woods (20 Mont. 91).....	161
Lockwood v. Manhattan S. & W. Co. (28 N. Y. App. Div. 68)....	168
Lockwood v. U. S. Steel Corporation (209 N. Y. 375)....	505, 507, 155
Long Island Loan & Trust Co., Matter of (92 N. Y. App. Div. 1)	60, 67
Lowrie v. Bank (Taney's Cir. Ct., Dec. 310).....	501
Lowry v. Polk Co. (51 Iowa 50).....	160

(References are to pages)

Page

## M

Maas v. M., K. & T. Ry. Co. (83 N. Y. 223).....	463
Machinists' Natl. Bank v. Field (126 Mass. 345).....	134
MacKenzie v. Taylor (6 L. C. J. 83).....	244
Macy v. Mercantile Trust Co. (59 Atl. 586).....	504
Madison Trust Co. v. Carnegie Trust Co. (167 N. Y. App. Div. 4)	252
Magoun v. Ill. Trust & Savings Bank (170 U. S. 283).....	31
Maine Trust & Bkg. Co. v. So. Loan & Trust Co. (92 Me. 444)..	81
Mallon, Matter of (43 N. Y. Misc. 569).....	93
Mandel v. Fidelity Trust Co. (107 S. W. 775).....	236
Manhattan Bank v. Walker (130 U. S. 267).....	164
Manigault v. Springs (199 U. S. 473).....	19
Marbury v. Ehlen (19 Atl. 649).....	503
Martin v. Bankers' Trust Co. (156 Pac. 87).....	220, 222, 226
Marquette v. Wilkinson (119 Mich. 419).....	76
Marx v. Parker (9 Wash. 473).....	160
Maryland Trust Co. v. Nat. Mechanics' Bank (102 Md. 608)....	234
Marymount v. Nev. State Banking Bd. (33 Nev. 333).....	23
Mason v. Whittehorne (2 Coldw. Tenn. 242).....	61
Mathewson v. Wakelee (83 Conn. 75).....	76
Mattison v. Mattison (53 Ore. 254).....	76
Mawhinney v. Converse (117 N. Y. App. Div. 255).....	53
May v. May (167 U. S. 310).....	27
Mayer v. Brensinger (180 Ill. 110).....	170
Mayer v. Brensinger (180 Ill. 110).....	176
Mayor v. Tenth Nat. Bank (111 N. Y. 446).....	242
Mays v. Shields (117 Ga. 814).....	180
McCahan v. Rieder (10 Dist. 1298).....	549
McCarter v. Imperial Trustee Co. (72 N. J. L. 42).....	47
McCarter v. McCarter (7 O. R. 243).....	92
McCauley v. Ridgewood Trust Co. (81 N. J. L. 86).....	58, 464
McClure v. Central Trust Co. (165 N. Y. 108).....	140, 143
McEachern v. Stewart (114 N. C. 370).....	61
McFadden v. Mays Landing, etc., R. R. (49 N. J. Eq. 176).....	106
McGuier v. Chicago, B. & Q. R. Co. (131 Iowa 340).....	19
McIntire v. Bailey (133 Ia. 418).....	61
McKee v. Downing (224 Mo. 115).....	76
McKinley L. L. & T. Co., In Re (1 Pa. Dist. R. 551).....	248
McLane v. Placeville, etc., R. Co. (66 Cal. 606).....	98
Mechanics' Bank v. New York & New Haven R. R. (13 N. Y. 599)	135
Meisel & Co. v. Nat. Jewelry Bd. of Trade (152 N. Y. Supp. 913)	208
Mercantile Bank v. New York (121 U. S. 138).....	12
Mercantile Trust & Deposit Co. v. Pickerell (99 N. C. 139).....	470
Mercantile Trust Co. v. Portland & O. R. (10 Fed. 604).....	460

(References are to pages)	Page
Mercantile Trust Co. v. Railroad (51 Fed. 529).....	99
Merchants' Nat. Bank v. Carhart (95 Ga. 394).....	165
Merchants' Nat. Bank v. Guilmartin (88 Ga. 797).....	165
Merchants' Nat. Bank v. Lovitt (114 Mo. 519).....	241
Merrick v. Halsey & Co. (U. S.).....	132
Merrill v. Farmers' Loan & Trust Co. (24 Hun. 297).....	96
Metropolitan Trust Co. v. R. R. Equipment Co. (108 Fed. 913)...	122
Miami Gas & Fuel Co. v. Mills (156 N. Y. App. Div. 542).....	470
Miles v. Montreal Copper Co. (40 N. Y. Misc. 282).....	154
Miles v. Vivian (79 Fed. 848).....	464
Miller v. Railroad (36 Vt. 449).....	101
Miners' & Merchants' Bank v. Snyder (100 Md. 57).....	81
Minnesota v. Duluth, etc., R. Co. (97 Fed. 353).....	98
Minnesota Loan & Trust Co. v. Beebe (40 Minn. 7).....	23, 29, 54
Missouri Pac. Ry. Co. v. Mercantile Trust Co. (76 N. Y. Misc. 10)	466
Montgomery County v. Cochran (121 Fed. 17).....	161
Moore v. Donahoo (217 Fed. 177).....	126
Moore v. Eure (101 N. C. 11).....	68
Morgan L. & T. Co. v. Texas, etc., Ry. (137 U. S. 172).....	106
Morse v. Holland Trust Co. (184 Ill. 255).....	222, 223, 226, 227
Mosler Safe Co. v. Guardian Trust Co. (208 N. Y. 524).....	81
Mount Vernon-Woodberry, etc., Co. v. Continental Trust Co. (121 Md. 163).....	466
Murphree v. Hanson (72 So. 437).....	55
Murphy v. Wheatley (102 Md. 501).....	81
Muth v. St. Louis Trust Co. (88 App. 596).....	235
Myer v. Western Car Co. (102 U. S. 1).....	123

## N

Nash v. Minnesota Title Ins. & Trust Co. (159 Mass. 437).....	109
Nashville R. R. v. Orr (85 U. S. 471).....	98
Nat. Bank of Goldsboro v. Hill (226 Fed. 102).....	473
Nat. Safe Dep. Co. v. Ill. (232 U. S. 58).....	173
Nat. Safe Dep. Co. v. Stead (250 Ill. 584).....	172
Nat. Savings Bank v. Ward (100 U. S. 195).....	209
Nay Aug. Lumber Co. v. Scranton Trust Co. (240 Pa. St. 500)...	107
Neb. Loan & Trust Co. v. Nine (27 Neb. 507).....	17
New England Water Co. v. Farmers' L. & T. Co. (54 N. Y. App. Div. 309) .....	109
New Jersey Paper Board & Wall Paper Mfg. Co. v. Security Trust & Safe Deposit Co. (57 N. J. Eq. 603).....	105
Newson (50 S. E. 597).....	514
New York & New Haven Railroad Co. v. Schuyler (34 N. Y. 30)	135
New York Life Ins. & Trust Co. v. Beebe (7 N. Y. 364).....	52
N. Y. Mortgage Co. v. Secretary of State (150 Mich. 197).....	219

	Page
Nichols v. Taunton Safe Deposit & Trust Co. (203 Mass. 551)...	81
Northern Pac. Ry. v. Owens (86 Minn. 188).....	163

## O

Old Colony Trust Co. v. Wichita (123 Fed. 762).....	99
Ouderkirk v. Central Nat. Bank (119 N. Y. 263).....	166
Overton Co. v. Copeland (96 Tenn. 296).....	161
Owsley v. Eads, Trustee (57 S. W. 225).....	514
Oxdey Stove Co. v. Butter County (121 Mo. 614).....	76

## P

Pacific Title & Trust Co. v. Sargent (Ore. 144 Pac. 452).....	14
Page County v. Rose (130 Ia. 296).....	250
Partridge v. Am. Trust Co. (211 Mass. 194).....	462
Patterson v. Guardian Trust Co. (144 N. Y. App. Div. 863).....	106
Penn. Co. for Ins. on Lives, etc., v. Bauerle (143 Ill. 459).....	224
Penn Steel Co. v. N. Y. City R. Co. (160 Fed. 222).....	115
People ex rel v. Faulkner (107 N. Y. 477).....	162
People ex rel v. Knickerbocker Trust Co. (77 N. Y. Supp. 1000)..	139
People ex rel v. Knickerbocker Trust Co. (38 N. Y. Misc. 446)...	154
People ex rel v. Reilly (38 Hun. 429).....	196
People ex rel v. Richards (99 N. Y. 620).....	199
People v. Binghamton Trust Co. (139 N. Y. 185).....	51
People v. Calif. Safe Deposit & Trust Co. (22 Cal. App. 69).....	65
People v. Knapp (206 N. Y. 373).....	232, 235
People v. Purdy (162 N. Y. Supp. 56).....	208
People's Trust Co., In Re (155 N. Y. Supp. 639).....	66
People v. Woodbury Dermatological Inst. (192 N. Y. 454).....	204
Perpetual Executors, etc., Ass'n v. Swan (1898) (A. C. 763).....	8
Phila. Trust Safe Deposit & Ins. Co. v. Philad. Trust Co. (123 Fed. 534) .....	15
Phillips v. Lawson (27 Ga. 228).....	163
Pierce v. Emery (32 N. H. 484).....	101
Place v. St. Paul Title Ins. & Trust Co. (67 Minn. 126).....	194
Platt v. Union Pac. R. R. (99 U. S. 48).....	98
Plummer v. Coler (178 U. S. 115).....	31
Plympton v. Bigelow (93 N. Y. 660).....	505
Preston v. Prather (137 U. S. 604).....	164
Providence Life & Trust Co. v. Mercer Co. (170 U. S. 593).....	180
Pullan v. Cincinnati, etc., R. Co. (4 Biss. 35).....	103
Pundmann v. Schoeneich (144 Mo. 149).....	76
Purcell v. Land T. G. Co. (94 Mo. App. 5).....	195
Purchase v. Atlantic Safe Deposit & Trust Co. (81 N. J. Eq. 344)	251
Purdy v. Lynch (145 N. Y. 462).....	83



(References are to pages)

Page

## R

R. Dominion Trust Co. (32 D. L. R. 63).....	235
Reagan v. Farmers' Loan & Trust Co. (154 U. S. 362).....	99
Rehden v. Wesley (29 Beav. 213).....	92, 95
Reichert v. Missouri, etc., Coal Co. (231 Ill. 238).....	76
Reid v. Reid (237 Pa. St. 176).....	64
Renkert v. Title Guaranty Trust Co. (102 Mo. App. 267).....	186
Reynolds v. Kroff (144 Mo. 433).....	471
Rhineland v. Farmers' Loan & Trust Co. (172 N. Y. 519).....	103, 464
Richard, Hanlon M., Co. v. Mississippi Valley Trust Co. (251 Mo. 553) .....	41, 43
Richardson v. New Orleans Debenture R. Co. (102 Fed. 780)....	251
Richt v. Evansville Foundry Ass'n (104 Ind. 70).....	76
Roach, In Re (50 Or. 179).....	68
Roane Iron Co. v. Wis. Trust Co. (97 Wis. 273).....	23
Roberts v. Stuyvesant Safe Dep. Co. (123 N. Y. 57).....	158, 168
Robinson v. Iron Ry. Co. (135 U. S. 522).....	115
Roby v. Smith (131 Ind. 342).....	535
Roby v. Title Guarantee & Trust Co. (166 Ill. 336).....	55
Rodard v. Cooke (36 L. T. N. S. 6504).....	92
Roseville Trust Co. v. Mott (96 Atl. 402).....	248
Royal Trust Co. v. Harding (78 N. Y. Misc. 309).....	223
Rumsey v. People's Ry. (154 Mo. 215).....	105

## S

Safe Deposit Co. v. Pollock (85 Pa. St. 391).....	170
St. Paul Trust Co. v. Strong (85 Minn. 1).....	66
Sargent v. Oregon S. & L. Co. (144 Pac. 455).....	248
Satterthwaite's Estate, In Re (60 N. J. Eq. 347).....	225
Sattig v. Small (1 Kan. 165).....	211
Schmidt v. Musson (20 S. D. 389).....	180
Schott's Estate (11 Pl. 120).....	549
Scott v. Gouch (111 N. E. 273).....	247
Selden v. Equitable Trust Co. (94 U. S. 419).....	50
Seymour v. Tradesmen's T. & S. Fund Co. (203 Pa. 151).....	192
Shaw v. Little Rock & Fort Smith R. (100 U. S. 612).....	110
Seldon v. Chappell (47 Hun. 59).....	37
Shirk v. LaFayette (52 Fed. 855).....	535
Sinking Fund Com'r v. Walker (6 How. (Miss.) 143).....	25
Slanning v. Style (3 P. Wms. 334).....	30
Smith v. Van Ostrand (64 N. Y. 278).....	517
South New Market M. Seminary v. Peaslee (15 N. H. 317).....	37
Spalding v. Roberts (149 Pac. 41).....	248
Speer v. Colbert (200 U. S. 130).....	77
Spencer v. Weber (26 N. Y. H. D. 285).....	515

(References are to pages)	Page
Spright v. Gaunt (9 App. Ga. 5).....	94
Standard Oil Co. v. Com. (107 Ky. 606).....	204
Standard Oil Co. v. U. S. (221 U. S. 1).....	133
Stark v. Gamble (43 N. H. 465).....	61
State Electro-Med. Inst. v. State (74 Neb. 40).....	203
State ex. rel v. Bankers' Trust Co. (157 Mo. App. 557).....	46
State ex rel v. Higby Co. (130 Ia. 69).....	46
State ex rel v. Lincoln Trust Co. (144 Mo. 562).....	38, 46
State v. Agey (88 S. E. 726).....	132
State v. Bank of Commerce (54 Neb. 725).....	251
State v. Bruce (17 Ida. 1).....	76
State v. Central Trust Co. (106 Md. 268).....	9
State v. Foster (5 Wyo. 199).....	160
State v. Mass. Bonding & Ins. Co. (91 Kan. 74).....	27
State v. Meagher (44 Mo. 356).....	68
State v. Michel (113 La. 4).....	52
State v. Midland State Bank (52 Neb. 1).....	251
State v. Nichols (40 Wash. 437).....	14, 47
State v. Northwestern Trust Co. (72 Neb. 497).....	246
State v. Purdy (67 Mo. 89).....	31
State v. Reid (125 Mo. 43).....	51
State v. Thum (6 Idaho 323).....	251
State v. Twining (N. J. L. 683).....	9
Stensgaard v. St. Paul R. E. T. Ins. Co. (Minn. 429).....	192
Stephens v. Rinehart (72 Pa. St. 434).....	178
Stephens v. Stephens' Adm'r (89 Ky. 125).....	76
Steppacher v. McClure (75 Mo. App. 135).....	46
Stikeman, Matter of (48 N. Y. Misc. 156).....	34
Stone v. Duvall (77 Ill. 475).....	178
Stone v. Missouri (101 U. S. 814).....	18
Strobel's Estate (2 W. N. C. 419).....	549
Struthers Coal & Coke Co. v. Union Trust Co. (227 Pa. St. 29).....	111, 465
Sturdee v. Cuba Eastern R. Co. (196 Fed. 211).....	242
Sturges v. Knapp (31 Vt. 52).....	107
Suarez v. El Banco Territorial Y Agricola (16 Porto Rico 599).....	246
Sullivan v. Kuolt (156 Wis. 72).....	38, 249

### T

Tatum v. Commercial Bank & Trust Co. (69 So. 508).....	241
Taylor v. Bryn Mawr College (34 N. J. Eq. 101).....	86
Taylor v. Cate (29 Ore. 515).....	178
Third Nat. Bank v. Boyd (44 Md. 47).....	167
Thompson v. Whitaker Iron Co. (141 W. Va. 574).....	158
Thoraldsen v. Hatch (87 Minn. 168).....	180

(References are to pages)	Page
Tilden v. Green (130 N. Y. 29).....	90
Tillinghast v. Johnson (34 R. I. 136).....	172
Tillinghast v. Merrill (151 N. Y. 135).....	161
Title G. & T. Co. v. Levitt (121 N. Y. App. Div. 485).....	201
Title G. & T. Co. v. Sage (146 N. Y. App. Div. 578).....	201
Toler v. East Tennessee V. & G. Ry. Co. (67 Fed. 168).....	110, 467
Tonges v. Vanderveer Canarsie Improvement Synd. (148 N. Y. Supp. 748) .....	77
Toronto Gen. Trust Co. v. C. B. & Q. (64 Hun. 1).....	516
Toronto Trust Co. v. C., B. & Q. R. R. Co. (32 Hun. 190).....	155
Trenton Potteries Co. v. Title G. & T. Co. (176 N. Y. 65).....	183
Trowbridge v. Spinning (23 Wash. 48).....	171
Tschetinian v. City Trust Co. (186 N. Y. 432).....	109
Tschetinian v. City Trust Co. (97 N. Y. App. Div. 380).....	142
Tucker v. Hampshire Trust Co. (69 N. H. 187).....	43
Turley, Margaret, Re (9 Mackey 315).....	224
Tuttle v. Gilmore (N. J. Eq. 617).....	461
Tyng v. Corporation Trust Co. (104 N. Y. App. Div. 486).....	154

## U

Union Bank & Trust Co. v. Wright (58 S. W. 755).....	44
Union Savings & Trust Co. v. Krumm (88 Wash. 20).....	50, 218, 236
Union Trust Co., Matter of (86 N. Y. Misc. 292).....	63
Union Trust Co. v. Sickles (125 N. Y. App. Div. 105).....	217
United Service Co., Re (L. R. 6 Ch. 212).....	166
U. S. Title Guaranty Co. v. Brown (166 N. Y. App. Div. 688)....	214
U. S. v. N. O. R. Co. (12 Wall. 362).....	122
U. S. v. Thomas (15 Wall. 337).....	160
U. S. v. Prescott (3 How. 578).....	161
Unity Co. v. Equitable Trust Co. (204 Ill. 595).....	101
Uvedale v. Ettrick (2 Ch. Cas. 130).....	27

## V

Van Sicklen v. Bartol (95 Fed. 793).....	53
Van Tuyl v. Scharmann (208 N. Y. 53).....	249
Vell v. Commonwealth Title Ins. & Trust Co. (189 U. S. 131)...	198
Venner v. Farmers' Loan & Trust Co. (54 N. Y. App. Div. 271)...	10
Vidal v. Girard (43 U. S. 127).....	28, 37

## W

Wadsworth v. Equitable Trust Co. (153 N. Y. App. Div. 737)....	140
Waller v. Catlett (83 Va. 200).....	69
Ward v. Joslin (186 U. S. 142).....	57
Washburn v. Benedict (46 N. Y. App. Div. 484).....	515

(References are to pages)		Page
Washington L. & T. Co. v. Susquehanna Coal Co. (26 App. D. C. 149) .....		173
Way v. Levy (41 La. Ann. 447).....		30
Weed v. Bergh (141 Wis. 569).....		23
Weichers v. Central Trust Co. (80 Hun. 576).....		140, 143
Wells Fargo & Co., v. Northern Pacific Ry. Co. (23 Fed. 469).....		51
Western Loan & Savings Co. v. Silver Bow Abstract Co. (31. Mont. 448) .....		188
Wheeler v. Equitable Trust Co. (206 Pa. 428).....		191
Whitney v. First Nat. Bank (154 U. S. 664).....		163
Wilkins v. Hogg (3 Giff. 116).....		92
Wilson v. People (19 Colo. 199).....		162
Wilson v. Wichita County (67 Tex. 647).....		160
Winter v. Montgomery, G. L., Co. (89 Ala. 544).....		134
Woodhouse v. Crandall (197 Ill. 104).....		252
Woodruff v. N. Y. S. E. & W. R. R. Co. (129 N. Y. 27).....		470
Woodruff v. Woodruff (44 N. J. Eq. 349).....		77
Wyckoff v. Epworth Hotel, etc., Co. (146 Mo. App. 554).....		47
Wyckoff, Matter of (67 N. Y. Misc. 1).....		55
<b>Y</b>		
Yellowstone Co. v. First Trust & Savings Bank (46 Mont. 439) ..		61
Yerkes v. Richards (32 Atl. 1089).....		514

# Index

(References are to pages)

Page

## A

ABSTRACT BUSINESS	
in general .....	182
when trust company as abstractor is liable to employer and when to third persons.....	188
ADMINISTRATORS	
joint liability of.....	84
ADVICE AND INSTRUCTION	
of court as protection to mortgage trustee.....	110
AFTER-ACQUIRED PROPERTY	
Clauses .....	122
AGENTS (See also Transfer Agents)	
trust companies, as agents, in general.....	52
trust companies as agents for individual fiduciaries.....	82
indemnity clauses in trust instruments with respect to agents.	94
liability of trust company as agent for individual fiduciaries..	85
ALABAMA	
admission of foreign trust companies.....	527
copy of "trust company laws," where obtainable.....	262
AMORTIZATION OF SECURITIES	
under New York law.....	300
ARIZONA	
admission of foreign trust companies.....	527
copy of "trust company laws," where obtainable.....	263
ARKANSAS	
admission of foreign trust companies.....	528
copy of "trust company laws," where obtainable.....	263
ASSESSMENT OF STOCKHOLDERS	
under New York law.....	313
ASSIGNEES	
trust companies as.....	55
ATTACHMENT	
of contents of safe deposit boxes.....	171

	Page
(References are to pages)	
<b>B</b>	
BANKS	
trust companies as .....	50
BONDHOLDERS	
intervention by .....	113
powers of trustee to bind.....	100
BOND ISSUES	
details for, in trust deeds.....	105
express and implied covenants in mortgage deeds.....	103
forms of trustee clauses.....	460
instructions of mortgagor to trustee.....	109
liability of trustee for breach of trust.....	108
liability of trustee for misrepresentation as to quality and extent of the security.....	108
nature and extent of implied duties.....	106
theory and history of.....	102
trustees for .....	96
BOOKS	
entries in, under N. Y. law.....	300
preservation of, under N. Y. law.....	325
BRANCH OFFICES	
in general .....	217
New York law.....	302
BY-LAWS	
form of, for an Illinois trust company.....	382
form of, for a Missouri trust company.....	409
form of, for a New York trust company.....	399
<b>C</b>	
CALIFORNIA	
admission of foreign trust companies.....	528
copy of "trust company laws," where obtainable.....	263
CANADA	
charter of the Imperial Trust Co. of Montreal.....	369
CAPITAL STOCK	
certificate of increase, form, N. Y. law.....	349
CAR TRUSTS	
in general .....	120
CHARITIES	
trust companies as trustees for.....	86
CHARTERS	
articles of association of Mississippi Valley Trust Company.	353



(References are to pages)		Page
CHARTERS (Continued)		
as measures of power.....		45
certificate of incorporation of a New Jersey trust company....		360
certificate of incorporation of a Pennsylvania trust company.		366
certificate of incorporation of a Canadian trust company.....		369
construction of .....		46
CO-FIDUCIARY		
trust company as.....		82
COLORADO		
admission of foreign trust companies.....		531
copy of "trust company laws," where obtainable.....		263
COMMITTEES		
trust companies as.....		53
COMPENSATION		
of trust companies .....		27
CONFIDENTIAL COMMUNICATIONS		
to officers and agents.....		242
provisions of model law.....		277
CONFLICTING MORTGAGES		
trust company as trustee for.....		113, 118
CONNECTICUT		
admission of foreign trust companies.....		531
copy of "trust company laws," where obtainable.....		263
CONVEYANCER		
duty to advise client of encroachments.....		184
relation assumed by trust company in acting as.....		184
CONSTRUCTION		
of charters .....		46
CONSOLIDATION		
of trust companies.....		31
CO-TRUSTEES		
indemnity clauses for protection of.....		91
COUNTERSIGNING		
definition of .....		136
COMMUNITY TRUSTS		
legality of .....		89
origin of .....		87
agreement and declaration of Trust, Boston Safe Deposit and Trust Company, Trustee .....		447
resolution creating the Cleveland Foundation.....		427
resolution creating the Los Angeles Community Foundation..		434

(References are to pages)

Page

## D

## DEFINITION

of "countersigning" .....	136
of "fiduciary companies" .....	7
of "registrar" .....	134
of "transfer agent" .....	132
of "trust companies" .....	9, 12
of "trustee company" .....	8

## DELAWARE

admission of foreign trust companies.....	532
copy of "trust company laws," where obtainable.....	263

## DEPOSIT

of company's own funds, under N. Y. law.....	302
of minor's, under N. Y. law.....	304
of securities .....	30
unclaimed, report of, under N. Y. law.....	323

## DEPOSITARY

liability for collateral .....	165
liability of officer for public funds .....	160
liability of officer for private funds .....	161
trust company, as in general .....	157
trust company, as, gratuitous .....	163

## DIRECTORS

annual meeting of, New York.....	317
classification of, New York.....	315
communications from banking department, N. Y.....	320
duties of .....	232
examinations by, model law .....	272
examinations and reports by, New York.....	319
failure to elect, New York.....	317
increase in number of, New York form.....	339
number of, New York.....	315
oath, requirement of, New York.....	316
oath, form of, New York.....	335
qualifications of, model law.....	272
reduction in number of, New York form.....	334
statement to, New York.....	317

## DISCRIMINATION

between corporations and individuals.....	20
---	----

## DIVIDENDS

under New York laws.....	307, 309
--------------------------	----------

## E

## EQUIPMENT TRUSTS

after-acquired property clauses .....	122
---------------------------------------	-----

	Page
(References are to pages)	
<b>EQUIPMENT TRUSTS (Continued)</b>	
clauses to be incorporated in forms of reports to trustees.....	124
indentures securing equipment trusts.....	485
report of Committee of Investment Bankers' Assn. on.....	474
safety of .....	123
suggestions as to legislation.....	126
trustees of equipment trusts.....	120
<b>ESCROWS</b>	
in general .....	177
nature of agreement .....	178
<b>EXAMINATIONS</b>	
by directors, under New York law.....	319
<b>EXECUTIVE COMMITTEE</b>	
duties of .....	232
<b>EXECUTOR</b>	
foreign .....	225
joint liability of .....	84
<b>F</b>	
<b>FLORIDA</b>	
admission of foreign trust companies.....	533
copy of "trust company laws," where obtainable.....	263
<b>FOLLOWING</b>	
of trust funds.....	76, 77, 250, 252
<b>FOREIGN BUSINESS</b>	
branch offices .....	217
complying with local laws by deposit of securities.....	224
effect of non-compliance with foreign laws in trust instrument	226
executor for non-resident.....	227
laws, rulings and opinions relating to admission of trust com-	
panies in foreign states.....	527-555
mortgage trusteeship .....	220
need of special laws .....	218
prima facie presumption of power to act in foreign states....	217
qualifying as executor by giving bond in individual case.....	225
restrictive statutes not retroactive.....	228
right to sue without qualifying under foreign laws.....	222
service of process.....	228, 229
<b>FORMS</b>	
equipment trusts .....	124
for organizing a New York trust company.....	323
of reports with reference to equipment trusts.....	485
stock transfers .....	496, 497

	Page
(References are to pages)	
FOUNDATION TRUSTS	
see Community trusts.	
<b>G</b>	
GENERAL LAWS	
and special laws for organization of trust companies.....	46
GEORGIA	
admission of foreign trust companies.....	533
copy of "trust company laws," where obtainable.....	263
GUARANTORS	
trust companies as .....	57
GUARDIANS	
trust companies as .....	53
<b>I</b>	
IDAHO	
admission of foreign trust companies.....	534
copy of "trust company laws," where obtainable.....	263
ILLINOIS	
admission of foreign trust companies.....	534
by-laws of an Illinois trust company.....	382
copy of "trust company laws," where obtainable.....	264
IMPLIED DUTIES	
of mortgage trustee.....	106
INDEMNITY CLAUSES	
co-trustees .....	91
INDIANA	
admission of foreign trust companies.....	534
copy of "trust company laws," where obtainable.....	264
INFORMATION	
confidential, model law.....	277
INSOLVENT TRUST COMPANIES	
preferences .....	259
INSTRUCTIONS TO TRUSTEE	
by majority bondholders.....	109
INTEGRITY	
of trust funds .....	61, 63
INTEREST	
New York laws.....	306, 307
rates on trust funds.....	64

	Page
(References are to pages)	
INTERPLEADER	
New York .....	305
INTERVENTION	
by individual bondholders.....	113
INVESTMENTS	
of capital, New York .....	300
of trust funds, model law.....	277
rules with respect to.....	66
IOWA	
admission of foreign trust companies.....	535
copy of "trust company laws," where obtainable.....	264
<b>J</b>	
JOINT TRUSTEES, EXECUTORS, ADMINISTRATORS	
liability of .....	84
<b>K</b>	
KANSAS	
admission of foreign trust companies.....	536
copy of "trust company laws," where obtainable.....	264
KENTUCKY	
admission of foreign trust companies.....	538
copy of "trust company laws," where obtainable.....	264
<b>L</b>	
LAWS	
pamphlet copies of trust company laws, where and how secured .....	262
LIABILITY	
of joint trustees of trust company for trust funds.....	73
LOANS	
restrictions upon, model law .....	273
restrictions upon, New York law.....	294
LOCATION	
change of, under New York law.....	310
LOUISIANA	
admission of foreign trust companies.....	539
copy of "trust company laws," where obtainable.....	264
<b>M</b>	
MAINE	
admission of foreign trust companies.....	539
copy of "trust company laws," where obtainable.....	264

	Page
(References are to pages)	
MARYLAND	
admission of foreign trust companies.....	540
copy of "trust company laws," where obtainable.....	264
MASSACHUSETTS	
admission of foreign trust companies.....	540
copy of "trust company laws," where obtainable.....	265
MEETINGS	
of stockholders, under New York law.....	315
MERGER	
of trust companies .....	31
MICHIGAN	
admission of foreign trust companies.....	541
copy of "trust company laws," where obtainable.....	265
MINGLING	
of trust funds, model law.....	276
MINNESOTA	
admission of foreign trust companies.....	541
copy of "trust company laws," where obtainable.....	265
MINORS	
deposits of, New York.....	304
MISSISSIPPI	
admission of foreign trust companies.....	541
copy of "trust company laws," where obtainable.....	265
MISSOURI	
admission of foreign trust companies.....	541
articles of association of Mississippi Valley Trust Co.....	353
copy of "trust company laws," where obtainable.....	265
form of by-laws of a Missouri trust company.....	409
MODEL TRUST COMPANY LAW	
copy of .....	269
MONTANA	
admission of foreign trust companies.....	542
copy of "trust company laws," where obtainable.....	265
MORTGAGES	
participating .....	63
MORTGAGE TRUSTEE	
clauses annotated .....	460
removal of .....	119
singleness of duty .....	112
<b>N</b>	
NAME	
change of N. Y. precedent.....	338



	Page
(References are to pages)	
NAME—Continued	
prohibited use of word "trust".....	13, 275
protection of .....	14
NEBRASKA	
admission of foreign trust companies.....	543
copy of "trust company laws," where obtainable.....	265
NEVADA	
admission of foreign trust companies.....	543
copy of "trust company laws," where obtainable.....	265
NEW HAMPSHIRE	
admission of foreign trust companies.....	544
copy of "trust company laws," where obtainable.....	265
NEW JERSEY	
admission of foreign trust companies.....	545
certificate of incorporation of a New Jersey trust company....	360
copy of "trust company laws," where obtainable.....	265
NEW MEXICO	
admission of foreign trust companies.....	545
copy of "trust company laws," where obtainable.....	266
NEW YORK	
admission of foreign trust companies.....	326
affidavit of payment of capital stock, form of.....	334
annual meetings of directors .....	317
annual meetings of stockholders .....	315
branch offices .....	302
books and records, preservation of.....	325
by-laws, form of .....	399
calculation of earnings for dividend period.....	307
change in corporate name, precedent showing.....	338
change of location .....	310
certificate of increase of capital stock.....	349
copy of "trust company laws," where obtainable.....	266
deposit of company's own funds .....	302
deposit of minors' .....	304
deposit of securities .....	284
directors, communications from banking department.....	320
directors, examinations by .....	319
directors, failure to elect .....	317
directors, monthly meetings of .....	317
directors, statement to .....	317
disqualifications of directors.....	316
dividends .....	309
incorporation of trust companies under New York laws.....	281
increase in number of directors, form for.....	339

	Page
(References are to pages)	
NEW YORK (Continued)	
instructions for organizing a trust company.....	328
interest in collateral demand loans not less than \$5,000.....	307
interpleader .....	305
liability of trust company for assessment by Supt.....	325
monthly meetings of directors.....	317
notice of intention to organize statute.....	282
notice of intention to organize, form of.....	329
number, classification, etc., of directors.....	315
oath of directors, requirement of .....	316
oath of directors, form of .....	335
organization certificate, form of.....	332
powers, in general .....	285
powers, prohibition against encroachments upon.....	326
precedents showing amendments to charter.....	338
proof of service of notice of intention to organize, form of..	331
qualifications of directors .....	316
rate of interest .....	306
reduction in number of directors, from.....	344
reports of directors, examinations, penalty, etc.....	319
reports to Supt., penalty, etc.....	321
reserves against deposits .....	303
restrictions as to entries in books .....	300
restrictions on investments of capital.....	300
restrictions on loans .....	294
restrictions on officers, directors and employes.....	325
restrictions on power to contract or accept or execute trusts.	299
restrictions on power to receive deposits.....	299
restrictions on taking and holding real estate.....	293
rights and liabilities of stockholders.....	311
submitting organization certificate to Supt.....	283
surplus fund .....	309
trust company law, text of.....	279
unclaimed deposits, report of.....	323
usury, effect of .....	306
verified list of stockholders, form of.....	333
when corporate existence begins.....	284
NORTH CAROLINA	
admission of foreign trust companies.....	545
copy of "trust company laws," where obtainable.....	266
NORTH DAKOTA	
admission of foreign trust companies.....	546
copy of "trust company laws," where obtainable.....	266

	Page
(References are to pages)	
<b>NOTARIES</b>	
officers of trust company, as.....	246
<b>O</b>	
<b>OATH</b>	
by trust companies unnecessary.....	28
<b>OFFICERS</b>	
acting as notaries and witnesses.....	246
authority of .....	235
impersonation of company by.....	231
imputable knowledge .....	237, 240
notice to .....	239
notice to officer must be in his department.....	242
protection of customers' affairs .....	242
restrictions on, under New York law.....	325
<b>OHIO</b>	
admission of foreign trust companies.....	545
copy of "trust company laws," where obtainable.....	266
<b>OKLAHOMA</b>	
admission of foreign trust companies.....	547
copy of "trust company laws," where obtainable.....	266
<b>OREGON</b>	
admission of foreign trust companies.....	547
copy of "trust company laws," where obtainable.....	266
<b>ORGANIZATION</b>	
of trust companies, under general laws.....	46
<b>P</b>	
<b>PARTICIPATING MORTGAGES</b>	
as investments for trust funds.....	63
<b>PHILIPPINE ISLANDS</b>	
copy of "trust company laws," where obtainable.....	266
<b>PENNSYLVANIA</b>	
admission of foreign trust companies.....	549
certificate of incorporation of a Pennsylvania trust company..	366
copy of "trust company laws," where obtainable.....	267
<b>POLICE POWER</b>	
as applied to trust companies.....	18
<b>POWER OF ATTORNEY</b>	
for access to safe deposit box.....	175

	Page
(References are to pages)	
<b>POWERS OF TRUST COMPANIES</b>	
abstractors .....	182
agents, in general.....	52
assignees .....	55
banks .....	50
charter as limitation upon.....	45
co-fiduciaries .....	50, 82
committees .....	53
conveyancers .....	182
depositories .....	157
encroachments upon, in general.....	37
encroachments in New York, prohibition against.....	326
escrows .....	177
foreign business .....	217
guarantors .....	57
guardians .....	53
New York statute.....	285, 289, 299
practicing law .....	202
real estate, under New York law.....	293
receivers .....	55
savings banks .....	51
sureties .....	56
transfer agents .....	130, 131
title insurers .....	182
trustees .....	60
ultra vires .....	43
underwriters .....	58
varied powers .....	47
<b>PRACTICING LAW</b>	
agreeing by attorneys with unlicensed persons.....	210
attorney relation to corporation.....	214
by corporation .....	202
corporation not a person.....	203
distinction as to corporation furnishing services to lawyers...	214
statutes regarding .....	204
<b>PREFERENCES</b>	
against insolvent trust companies.....	259
<b>R</b>	
<b>REAL ESTATE</b>	
restrictions on taking and holding, under New York law.....	293
<b>RECEIVERS</b>	
trust companies as .....	55

	Page
(References are to pages)	
REGISTRAR (See also Transfer Agents)	
contracts in limitation of liability.....	148
defined .....	134
inspection of books .....	154
liability of corporation for acts of.....	138
liability of trust company as .....	146
REMOVAL	
of trustee .....	119
REPORTS	
of trust companies .....	248
to Superintendent of Banks, New York.....	321
RESERVES	
against deposits, New York.....	303
RHODE ISLAND	
admission of foreign trust companies.....	551
copy of "trust company laws," where obtainable.....	267
<b>S</b>	
SAFE DEPOSIT	
access under power of attorney.....	175
attachment of contents of boxes.....	171
companies, liability of .....	167
joint renting and access.....	173
SALES	
by trust company model law.....	277
SAVINGS BANK	
powers of trust company.....	51
SEARCHING TITLES	
by trust companies.....	182
SECURITIES	
amortization of, New York.....	300
SOUTH CAROLINA	
admission of foreign trust companies.....	552
copy of "trust company laws," where obtainable.....	267
SOUTH DAKOTA	
admission of foreign trust companies.....	552
copy of "trust company laws," where obtainable.....	267
STIPULATIONS	
for protection of trustees.....	91
STOCKHOLDERS	
annual meeting of, New York.....	315
assessment of, New York.....	313
rights and liabilities of, New York.....	311

	Page
(References are to pages)	
SUCCESSORSHIP	
of trust companies.....	31
SUITS	
by trustees for bond issue, before foreclosure.....	99
SUPERVISION	
of trust companies.....	248
SURETIES	
trust companies as.....	56
SURPLUS FUND	
New York .....	309
<b>T</b>	
TENNESSEE	
admission of foreign trust companies.....	553
copy of "trust company laws," where obtainable.....	267
TEXAS	
admission of foreign trust companies.....	554
copy of "trust company laws," where obtainable.....	267
TITLE INSURANCE	
care required .....	189
construction of policy.....	193
defined .....	183
fees .....	201
liability and measure of damages.....	185
policy construed to be one of indemnity.....	191
protection of private records.....	200
record title only insured.....	190
relation assumed by trust company in examining.....	184
regulation by register of inspection of records.....	199
rights against grantor.....	194
right of access to public records.....	196, 197, 198
statutes of limitation .....	195
subrogation of right to sue for loss.....	192
voidance of policy by false answer to application.....	192
what interest covered .....	188
TRANSFER AGENT	
contracts in limitation of liability.....	148
countersigning .....	136
defined .....	132
in general .....	129
inspection of books .....	153



(References are to pages)		Page
<b>TRANSFER AGENT (Continued)</b>		
instructions to transfer department.....		519
liability of corporation for acts of.....		138
liability of trust company as.....	140, 143, 145,	151
possibility of compelling corporation to employ.....		132
power of bank to act as.....		130
precautionary requirements and rules.....		150
printing name of trust company on certificates.....		152
report of conference of transfer agents and counsel.....		500
right of corporations to employ.....		137
suggestions about stock transfers.....		497
suggestions to corporations desiring the services of a trust company as transfer agent.....		496
where cause of action arises against a transfer agent.....		155
<b>TRUSTEES</b>		
bond issues, trust companies as trustees for.....		96
bond issues, suits before foreclosure .....		99
bond issues, instructions of a court.....		110
car trusts, trust companies as trustees for.....		120
charities trust companies as trustees for conventional trustees, trust companies as .....		60
equipment trusts, trust companies as trustees for.....		120
liability of mortgage trustees for breach of trust.....		108
liability of mortgage trustees for misrepresentation with re- spect to quality and extent of bonds.....		108
<b>TRUST FUNDS</b>		
creating .....		256
deposit of, in own banking department.....		64
following of .....	76, 77	
integrity of .....	61, 63	
investment of, in general .....		66
investment of, model law .....		277
liability for .....		73
mingling of, prohibited, model law.....		276
participating mortgages .....		63
<b>U</b>		
<b>ULTRA VIRES</b>		
trust companies .....		43
<b>UNCLAIMED DEPOSITS</b>		
reports of, New York law.....		323
<b>UNDERWRITERS</b>		
trust companies as .....		58

	Page
(References are to pages)	
UNIFORM LAWS	
as applied to trust companies.....	4
USURY	
effect of, New York.....	306
UTAH	
admission of foreign trust companies.....	554
copy of "trust company laws," where obtainable.....	267
<b>V</b>	
VERMONT	
admission of foreign trust companies.....	554
copy of "trust company laws," where obtainable.....	267
VISITATION	
of trust companies .....	248
VIRGINIA	
admission of foreign trust companies.....	555
copy of "trust company laws," where obtainable.....	267
<b>W</b>	
WASHINGTON	
admission of foreign trust companies.....	555
copy of "trust company laws," where obtainable.....	267
WEST VIRGINIA	
admission of foreign trust companies.....	556
copy of "trust company laws," where obtainable.....	268
WISCONSIN	
admission of foreign trust companies.....	556
copy of "trust company laws," where obtainable.....	268
WITNESSES	
officers as .....	246
WYOMING	
admission of foreign trust companies.....	557
copy of "trust company laws," where obtainable.....	268













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